

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation,

Appellants,

vs.

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito,

Respondent.

Case No. 79355

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Appeal from the Second Judicial
District Court, the Honorable Connie
J. Steinheimer Presiding

APPELLANTS' APPENDIX, VOLUME 3
(Nos. 415–574)

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10	September 20, 2010 email from P. Morabito to Dennis and Yalamanchili RE: Attorney client privileged communication	Vol. 12, 1868–1870
11	September 20, 2010 email string RE: Attorney client privileged communication	Vol. 12, 1871–1875
12	Appraisal of Real Property: 370 Los Olivos, Laguna Beach, CA, as of Sept. 24, 2010	Vol. 12, 1876–1903
13	Excerpted Transcript of March 21, 2016 Deposition of P. Morabito	Vol. 12, 1904–1919
14	P. Morabito Redacted Investment and Bank Report from Sept. 1 to Sept. 30, 2010	Vol. 12, 1920–1922
15	Excerpted Transcript of June 25, 2015 Deposition of 341 Meeting of Creditors	Vol. 12, 1923–1927
16	Excerpted Transcript of December 5, 2015 Deposition of P. Morabito	Vol. 12, 1928–1952
17	Purchase and Sale Agreement between Arcadia Trust and Bayuk Trust entered effective as of Sept. 27, 2010	Vol. 12, 1953–1961
18	First Amendment to Purchase and Sale Agreement between Arcadia Trust and Bayuk Trust entered effective as of Sept. 28, 2010	Vol. 12, 1962–1964
19	Appraisal Report providing market value estimate of real property located at 8355 Panorama Drive, Reno, NV as of Dec. 7, 2011	Vol. 12, 1965–1995

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
20	An Appraisal of a vacant .977± Acre Parcel of Industrial Land Located at 49 Clayton Place West of the Pyramid Highway (State Route 445) Sparks, Washoe County, Nevada and a single-family residence located at 8355 Panorama Drive Reno, Washoe County, Nevada 89511 as of October 1, 2010 a retrospective date	Vol. 13, 1996–2073
21	APN: 040-620-09 Declaration of Value (dated 12/31/2012)	Vol. 14, 2074–2075
22	Sellers Closing Statement for real property located at 8355 Panorama Drive, Reno, NV 89511	Vol. 14, 2076–2077
23	Bill of Sale for real property located at 8355 Panorama Drive, Reno, NV 89511	Vol. 14, 2078–2082
24	Operating Agreement of Baruk Properties LLC	Vol. 14, 2083–2093
25	Edward Bayuk, as trustee of the Edward William Bayuk Living Trust’s Answer to Plaintiff’s First Set of Interrogatories (dated 09/14/2014)	Vol. 14, 2094–2104
26	Summary Appraisal Report of real property located at 1461 Glenneyre Street, Laguna Beach, CA 92651, as of Sept. 25, 2010	Vol. 14, 2105–2155
27	Appraisal of Real Property as of Sept. 23, 2010: 1254 Mary Fleming Circle, Palm Springs, CA 92262	Vol. 15, 2156–2185
28	Appraisal of Real Property as of Sept. 23, 2010: 1254 Mary Fleming Circle, Palm Springs, CA 92262	Vol. 15, 2186–2216

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
29	Membership Interest Transfer Agreement between Arcadia Trust and Bayuk Trust entered effective as of Oct. 1, 2010	Vol. 15, 2217–2224
30	PROMISSORY NOTE [Edward William Bayuk Living Trust (“Borrower”) promises to pay Arcadia Living Trust (“Lender”) the principal sum of \$1,617,050.00, plus applicable interest] (dated 10/01/2010)	Vol. 15, 2225–2228
31	Certificate of Merger dated Oct. 4, 2010	Vol. 15, 2229–2230
32	Articles of Merger Document No. 20100746864-78 (recorded date 10/04/2010)	Vol. 15, 2231–2241
33	Excerpted Transcript of September 28, 2015 Deposition of Edward William Bayuk	Vol. 15, 2242–2256
34	Grant Deed for real property 1254 Mary Fleming Circle, Palm Springs, CA 92262; APN: 507-520-015 (recorded 11/04/2010)	Vol. 15, 2257–2258
35	General Conveyance made as of Oct. 31, 2010 between Woodland Heights Limited (“Vendor”) and Arcadia Living Trust (“Purchaser”)	Vol. 15, 2259–2265
36	Appraisal of Real Property as of Sept. 24, 2010: 371 El Camino Del Mar, Laguna Beach, CA 92651	Vol. 15, 2266–2292
37	Excerpted Transcript of December 6, 2016 Deposition of P. Morabito	Vol. 15, 2293–2295
38	Page intentionally left blank	Vol. 15, 2296–2297
39	Ledger of Edward Bayuk to P. Morabito	Vol. 15, 2298–2300

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
40	Loan Calculator: Payment Amount (Standard Loan Amortization)	Vol. 15, 2301–2304
41	Payment Schedule of Edward Bayuk Note in Favor of P. Morabito	Vol. 15, 2305–2308
42	November 10, 2011 email from Vacco RE: Baruk Properties, LLC/P. Morabito/Bank of America, N.A.	Vol. 15, 2309–2312
43	May 23, 2012 email from Vacco to Steve Peek RE: Formal Settlement Proposal to resolve the Morabito matter	Vol. 15, 2313–2319
44	Excerpted Transcript of March 12, 2015 Deposition of 341 Meeting of Creditors	Vol. 15, 2320–2326
45	Shareholder Interest Purchase Agreement between P. Morabito and Snowshoe Petroleum, Inc. (dated 09/30/2010)	Vol. 15, 2327–2332
46	P. Morabito Statement of Assets & Liabilities as of May 5, 2009	Vol. 15, 2333–2334
47	March 10, 2010 email from Naz Afshar, CPA to Darren Takemoto, CPA RE: Current Personal Financial Statement	Vol. 15, 2335–2337
48	March 10, 2010 email from P. Morabito to Jon RE: ExxonMobil CIM for Florida and associated maps	Vol. 15, 2338–2339
49	March 20, 2010 email from P. Morabito to Vacco RE: proceed with placing binding bid on June 22nd with ExxonMobil	Vol. 15, 2340–2341

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
50	P. Morabito Statement of Assets & Liabilities as of May 30, 2010	Vol. 15, 2342–2343
51	June 28, 2010 email from P. Morabito to George R. Garner RE: ExxonMobil Chicago Market Business Plan Review	Vol. 15, 2344–2345
52	Plan of Merger of Consolidated Western Corp. with and into Superpumper, Inc. (dated 09/28/2010)	Vol. 15, 2346–2364
53	Page intentionally left blank	Vol. 15, 2365–2366
54	BBVA Compass Proposed Request on behalf of Superpumper, Inc. (dated 12/15/2010)	Vol. 15, 2367–2397
55	Business Valuation Agreement between Matrix Capital Markets Group, Inc. and Superpumper, Inc. (dated 09/30/2010)	Vol. 15, 2398–2434
56	Expert report of James L. McGovern, CPA/CFF, CVA (dated 01/25/2016)	Vol. 16, 2435–2509
57	June 18, 2014 email from Sam Morabito to Michael Vanek RE: SPI Analysis	Vol. 17, 2510–2511
58	Declaration of P. Morabito in Support of Opposition to Motion of JH, Inc., Jerry Herbst, and Berry-Hinckley Industries for Order Prohibiting Debtor from Using, Acquiring, or Disposing of or Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee; Case No. BK-N-13-51237 (filed 07/01/2013)	Vol. 17, 2512–2516

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
59	State of California Secretary of State Limited Liability Company – Snowshoe Properties, LLC; File No. 201027310002 (filed 09/29/2010)	Vol. 17, 2517–2518
60	PROMISSORY NOTE [Snowshoe Petroleum (“Maker”) promises to pay P. Morabito (“Holder”) the principal sum of \$1,462,213.00] (dated 11/01/2010)	Vol. 17, 2519–2529
61	PROMISSORY NOTE [Superpumper, Inc. (“Maker”) promises to pay Compass Bank (the “Bank” and/or “Holder”) the principal sum of \$3,000,000.00] (dated 08/13/2010)	Vol. 17, 2530–2538
62	Excerpted Transcript of October 21, 2015 Deposition of Salvatore R. Morabito	Vol. 17, 2539–2541
63	Page intentionally left blank	Vol. 17, 2542–2543
64	Edward Bayuk’s Answers to Plaintiff’s First Set of Interrogatories (dated 09/14/2014)	Vol. 17, 2544–2557
65	October 12, 2012 email from Stan Bernstein to P. Morabito RE: 2011 return	Vol. 17, 2558–2559
66	Page intentionally left blank	Vol. 17, 2560–2561
67	Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco	Vol. 17, 2562–2564
68	Snowshoe Petroleum, Inc.’s letter of intent to set out the framework of the contemplated transaction between: Snowshoe Petroleum, Inc.; David Dwelle, LP; Eclipse Investments, LP; Speedy Investments; and TAD Limited Partnership (dated 04/21/2011)	Vol. 17, 2565–2572

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
69	Excerpted Transcript of July 10, 2017 Deposition of Dennis C. Vacco	Vol. 17, 2573–2579
70	April 15, 2011 email from P. Morabito to Christian Lovelace; Gregory Ivancic; Vacco RE: \$65 million loan offer from Cerberus	Vol. 17, 2580–2582
71	Email from Vacco to P. Morabito RE: \$2 million second mortgage on the Reno house	Vol. 17, 2583–2584
72	Email from Vacco to P. Morabito RE: Tim Haves	Vol. 17, 2585–2586
73	Settlement Agreement, Loan Agreement Modification & Release dated as of Sept. 7, 2012, entered into by Bank of America and P. Morabito	Vol. 17, 2587–2595
74	Page intentionally left blank	Vol. 17, 2596–2597
75	February 10, 2012 email from Vacco to Paul Wells and Timothy Haves RE: 1461 Glenneyre Street, Laguna Beach – Sale	Vol. 17, 2598–2602
76	May 8, 2012 email from P. Morabito to Vacco RE: Proceed with the corporate set-up with Ray, Edward and P. Morabito	Vol. 17, 2603–2604
77	September 4, 2012 email from Vacco to Edward Bayuk RE: Second Deed of Trust documents	Vol. 17, 2605–2606
78	September 18, 2012 email from P. Morabito to Edward Bayuk RE: Deed of Trust	Vol. 17, 2607–2611
79	October 3, 2012 email from Vacco to P. Morabito RE: Term Sheet on both real estate deal and option	Vol. 17, 2612–2614

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
80	March 14, 2013 email from P. Morabito to Vacco RE: BHI Hinckley	Vol. 17, 2615–2616
81	Page intentionally left blank	Vol. 17, 2617–2618
82	November 11, 2011 email from Vacco to P. Morabito RE: Trevor’s commitment to sign	Vol. 17, 2619–2620
83	November 28, 2011 email string RE: Wiring \$560,000 to Lippes Mathias	Vol. 17, 2621–2623
84	Page intentionally left blank	Vol. 17, 2624–2625
85	Page intentionally left blank	Vol. 17, 2626–2627
86	Order for Relief Under Chapter 7; Case No. BK-N-13-51236 (filed 12/22/2014)	Vol. 17, 2628–2634
87	Report of Undisputed Election (11 U.S.C § 702); Case No. BK-N-13-51237 (filed 01/23/2015)	Vol. 17, 2635–2637
88	Amended Stipulation and Order to Substitute a Party to NRCP 17(a) (filed 06/11/2015)	Vol. 17, 2638–2642
89	Membership Interest Purchase Agreement, entered into as of Oct. 6, 2010 between P. Morabito and Edward Bayuk	Vol. 17, 2643–2648
90	Complaint; Case No. BK-N-13-51237 (filed 10/15/2015)	Vol. 17, 2649–2686
91	Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/2010)	Vol. 17, 2687–2726

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Objection to Recommendation for Order filed August 17, 2017 (filed 08/28/2017)		Vol. 18, 2727–2734
Exhibit to Objection to Recommendation for Order		
Exhibit	Document Description	
1	Plaintiff’s counsel’s Jan. 24, 2017, email memorializing the discovery dispute agreement	Vol. 18, 2735–2736
Opposition to Objection to Recommendation for Order filed August 17, 2017 (filed 09/05/2017)		Vol. 18, 2737–2748
Exhibit to Opposition to Objection to Recommendation for Order		
Exhibit	Document Description	
A	Declaration of Teresa M. Pilatowicz, Esq., in Support of Opposition to Objection to Recommendation for Order (filed 09/05/2017)	Vol. 18, 2749–2752
Reply to Opposition to Objection to Recommendation for Order filed August 17, 2017 (dated 09/15/2017)		Vol. 18, 2753–2758
Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017)		Vol. 18, 2759–2774
Defendants’ Separate Statement of Disputed Facts in Support of Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017)		Vol. 18, 2775–2790

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Exhibits to Defendants' Separate Statement of Disputed Facts in Support of Opposition to Plaintiff's Motion for Partial Summary Judgment		
Exhibit	Document Description	
1	Judgment in <i>Consolidated Nevada Corp., et al v. JH. et al.</i> ; Case No. CV07-02764 (filed 08/23/2011)	Vol. 18, 2791–2793
2	Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco	Vol. 18, 2794–2810
3	Order Denying Motion to Dismiss Involuntary Chapter 7 Petition and Suspending Proceedings Pursuant to 11 U.S.C §305(a)(1); Case No. BK-N-13-51237 (filed 12/17/2013)	Vol. 18, 2811–2814
4	Excerpted Transcript of March 21, 2016 Deposition of P. Morabito	Vol. 18, 2815–2826
5	Excerpted Transcript of September 28, 2015 Deposition of Edward William Bayuk	Vol. 18, 2827–2857
6	Appraisal	Vol. 18, 2858–2859
7	Budget Summary as of Jan. 7, 2016	Vol. 18, 2860–2862
8	Excerpted Transcript of March 24, 2016 Deposition of Dennis Banks	Vol. 18, 2863–2871
9	Excerpted Transcript of March 22, 2016 Deposition of Michael Sewitz	Vol. 18, 2872–2879
10	Excerpted Transcript of April 27, 2011 Deposition of Darryl Noble	Vol. 18, 2880–2883

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
11	Copies of cancelled checks from Edward Bayuk made payable to P. Morabito	Vol. 18, 2884–2892
12	CBRE Appraisal of 14th Street Card Lock Facility (dated 02/26/2010)	Vol. 18, 2893–2906
13	Bank of America wire transfer from P. Morabito to Salvatore Morabito in the amount of \$146,127.00; and a wire transfer from P. Morabito to Lippes for \$25.00 (date 10/01/2010)	Vol. 18, 2907–2908
14	Excerpted Transcript of October 21, 2015 Deposition of Christian Mark Lovelace	Vol. 18, 2909–2918
15	June 18, 2014 email from Sam Morabito to Michael Vanek RE: Analysis of the Superpumper transaction in 2010	Vol. 18, 2919–2920
16	Excerpted Transcript of October 21, 2015 Deposition of Salvatore R. Morabito	Vol. 18, 2921–2929
17	PROMISSORY NOTE [Snowshoe Petroleum (“Maker”) promises to pay P. Morabito (“Holder”) the principal sum of \$1,462,213.00] (dated 11/01/2010)	Vol. 18, 2930–2932
18	TERM NOTE [P. Morabito (“Borrower”) promises to pay Consolidated Western Corp. (“Lender”) the principal sum of \$939,000.00, plus interest] (dated 09/01/2010)	Vol. 18, 2933–2934
19	SUCCESSOR PROMISSORY NOTE [Snowshoe Petroleum (“Maker”) promises to pay P. Morabito (“Holder”) the principal sum of \$492,937.30, plus interest] (dated 02/01/2011)	Vol. 18, 2935–2937

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
20	Edward Bayuk's wire transfer to Lippes in the amount of \$517,547.20 (dated 09/29/2010)	Vol. 18, 2938–2940
21	Salvatore Morabito Bank of Montreal September 2011 Wire Transfer	Vol. 18, 2941–2942
22	Declaration of Salvatore Morabito (dated 09/21/2017)	Vol. 18, 2943–2944
23	Edward Bayuk bank wire transfer to Superpumper, Inc., in the amount of \$659,000.00 (dated 09/30/2010)	Vol. 18, 2945–2947
24	Edward Bayuk checking account statements between 2010 and 2011 funding the company with transfers totaling \$500,000	Vol. 18, 2948–2953
25	Salvatore Morabito's wire transfer statement between 2010 and 2011, funding the company with \$750,000	Vol. 18, 2954–2957
26	Payment Schedule of Edward Bayuk Note in Favor of P. Morabito	Vol. 18, 2958–2961
27	September 15, 2010 email from Vacco to Yalamanchili and P. Morabito RE: Follow Up Thoughts	Vol. 18, 2962–2964
Reply in Support of Motion for Partial Summary Judgment (dated 10/10/2017)		Vol. 19, 2965–2973
Order Regarding Discovery Commissioner's Recommendation for Order dated August 17, 2017 (filed 12/07/2017)		Vol. 19, 2974–2981

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Order Denying Motion for Partial Summary Judgment (filed 12/11/2017)		Vol. 19, 2982–2997
Defendants’ Motions in Limine (filed 09/12/2018)		Vol. 19, 2998–3006
Exhibits to Defendants’ Motions in Limine		
Exhibit	Document Description	
1	Plaintiff’s Second Supplement to Amended Disclosures Pursuant to NRCP 16.1(A)(1) (dated 04/28/2016)	Vol. 19, 3007–3016
2	Excerpted Transcript of March 25, 2016 Deposition of William A. Leonard	Vol. 19, 3017–3023
3	Plaintiff, Jerry Herbst’s Responses to Defendant Snowshoe Petroleum, Inc.’s Set of Interrogatories (dated 02/11/2015); and Plaintiff, Jerry Herbst’s Responses to Defendant, Salvatore Morabito’s Set of Interrogatories (dated 02/12/2015)	Vol. 19, 3024–3044
Motion in Limine to Exclude Testimony of Jan Friederich (filed 09/20/2018)		Vol. 19, 3045–3056
Exhibits to Motion in Limine to Exclude Testimony of Jan Friederich		
Exhibit	Document Description	
1	Defendants’ Rebuttal Expert Witness Disclosure (dated 02/29/2016)	Vol. 19, 3057–3071
2	Condensed Transcript of March 29, 2016 Deposition of Jan Friederich	Vol. 19, 3072–3086

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Opposition to Defendants' Motions in Limine (filed 09/28/2018)		Vol. 19, 3087–3102
Exhibits to Opposition to Defendants' Motions in Limine		
Exhibit	Document Description	
A	Declaration of Teresa M. Pilatowicz, Esq. in Support of Opposition to Defendants' Motions in Limine (filed 09/28/2018)	Vol. 19, 3103–3107
A-1	Plaintiff's February 19, 2016, Amended Disclosures Pursuant to NRCP 16.1(A)(1)	Vol. 19, 3108–3115
A-2	Plaintiff's January 26, 2016, Expert Witnesses Disclosures (without exhibits)	Vol. 19, 3116–3122
A-3	Defendants' January 26, 2016, and February 29, 2016, Expert Witness Disclosures (without exhibits)	Vol. 19, 3123–3131
A-4	Plaintiff's August 17, 2017, Motion for Partial Summary Judgment (without exhibits)	Vol. 19, 3132–3175
A-5	Plaintiff's August 17, 2017, Statement of Undisputed Facts in Support of his Motion for Partial Summary Judgment (without exhibits)	Vol. 19, 3176–3205
Defendants' Reply in Support of Motions in Limine (filed 10/08/2018)		Vol. 20, 3206–3217
Exhibit to Defendants' Reply in Support of Motions in Limine		
Exhibit	Document Description	

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
1	Chapter 7 Trustee, William A. Leonard's Responses to Defendants' First Set of Interrogatories (dated 05/28/2015)	Vol. 20, 3218–3236
Defendants' Opposition to Plaintiff's Motions in Limine to Exclude the Testimony of Jan Friederich (filed 10/08/2018)		Vol. 20, 3237–3250
Exhibits to Defendants' Opposition to Plaintiff's Motions in Limine to Exclude the Testimony of Jan Friederich		
Exhibit	Document Description	
1	Excerpt of Matrix Report (dated 10/13/2010)	Vol. 20, 3251–3255
2	Defendants' Rebuttal Expert Witness Disclosure (dated 02/29/2016)	Vol. 20, 3256–3270
3	November 9, 2009 email from P. Morabito to Daniel Fletcher; Jim Benbrook; Don Whitehead; Sam Morabito, etc. RE: Jan Friederich entered consulting agreement with Superpumper	Vol. 20, 3271–3272
4	Excerpted Transcript of March 29, 2016 Deposition of Jan Friederich	Vol. 20, 3273–3296
Defendants' Objections to Plaintiff's Pretrial Disclosures (filed 10/12/2018)		Vol. 20, 3297–3299
Objections to Defendants' Pretrial Disclosures (filed 10/12/2018)		Vol. 20, 3300–3303
Reply to Defendants' Opposition to Plaintiff's Motion in Limine to Exclude the Testimony of Jan Friederich (filed 10/12/2018)		Vol. 20, 3304–3311

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Minutes of September 11, 2018, Pre-trial Conference (filed 10/19/2018)		Vol. 20, 3312
Stipulated Facts (filed 10/29/2018)		Vol. 20, 3313–3321
Defendants’ Points and Authorities RE: Objection to Admission of Documents in Conjunction with the Depositions of P. Morabito and Dennis Vacco (filed 10/30/2018)		Vol. 20, 3322–3325
Plaintiff’s Points and Authorities Regarding Authenticity and Hearsay Issues (filed 10/31/2018)		Vol. 20, 3326–3334
Clerk’s Trial Exhibit List (filed 02/28/2019)		Vol. 21, 3335–3413
Exhibits to Clerk’s Trial Exhibit List		
Exhibit	Document Description	
1	Certified copy of the Transcript of September 13, 2010 Judge’s Ruling; Case No. CV07-02764	Vol. 21, 3414–3438
2	Findings of Fact, Conclusions of Law, and Judgment; Case No. CV07-02764 (filed 10/12/2010)	Vol. 21, 3439–3454
3	Judgment; Case No. CV07-0767 (filed 08/23/2011)	Vol. 21, 3455–3456
4	Confession of Judgment; Case No. CV07-02764 (filed 06/18/2013)	Vol. 21, 3457–3481
5	November 30, 2011 Settlement Agreement and Mutual Release	Vol. 22, 3482–3613
6	March 1, 2013 Forbearance Agreement	Vol. 22, 3614–3622

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
8	Order Denying Motion to Dismiss Involuntary Chapter 7 Petition and Suspending Proceedings, Case 13-51237. ECF No. 94, (filed 12/17/2013)	Vol. 22, 3623–3625
19	Report of Undisputed Election– Appointment of Trustee, Case No. 13-51237, ECF No. 220	Vol. 22, 3626–3627
20	Stipulation and Order to Substitute a Party Pursuant to NRCF 17(a), Case No. CV13-02663, May 15, 2015	Vol. 22, 3628–3632
21	Non-Dischargeable Judgment Regarding Plaintiff’s First and Second Causes of Action, Case No. 15-05019-GWZ, ECF No. 123, April 30, 2018	Vol. 22, 3633–3634
22	Memorandum & Decision; Case No. 15-05019-GWZ, ECF No. 124, April 30, 2018	Vol. 22, 3635–3654
23	Amended Findings of Fact, Conclusions of Law in Support of Judgment Regarding Plaintiff’s First and Second Causes of Action; Case 15-05019-GWZ, ECF No. 122, April 30, 2018	Vol. 22, 3655–3679
25	September 15, 2010 email from Yalamanchili to Vacco and P. Morabito RE: Follow Up Thoughts	Vol. 22, 3680–3681
26	September 18, 2010 email from P. Morabito to Vacco	Vol. 22, 3682–3683
27	September 20, 2010 email from Vacco to P. Morabito RE: Spirit	Vol. 22, 3684–3684
28	September 20, 2010 email between Yalamanchili and Crotty RE: Morabito -Wire	Vol. 22, 3685–3687

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
29	September 20, 2010 email from Yalamanchili to Graber RE: Attorney Client Privileged Communication	Vol. 22, 3688–3689
30	September 21, 2010 email from P. Morabito to Vacco and Cross RE: Attorney Client Privileged Communication	Vol. 22, 3690–3692
31	September 23, 2010 email chain between Graber and P. Morabito RE: Change of Primary Residence from Reno to Laguna Beach	Vol. 22, 3693–3694
32	September 23, 2010 email from Yalamanchili to Graber RE: Change of Primary Residence from Reno to Laguna Beach	Vol. 22, 3695–3696
33	September 24, 2010 email from P. Morabito to Vacco RE: Superpumper, Inc.	Vol. 22, 3697–3697
34	September 26, 2010 email from Vacco to P. Morabito RE: Judgment for a fixed debt	Vol. 22, 3698–3698
35	September 27, 2010 email from P. Morabito to Vacco RE: First Amendment to Residential Lease executed 9/27/2010	Vol. 22, 3699–3701
36	November 7, 2012 emails between Vacco, P. Morabito, C. Lovelace RE: Attorney Client Privileged Communication	Vol. 22, 3702–3703
37	Morabito BMO Bank Statement – September 2010	Vol. 22, 3704–3710
38	Lippes Mathias Trust Ledger History	Vol. 23, 3711–3716

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
39	Fifth Amendment & Restatement of the Trust Agreement for the Arcadia Living Trust dated September 30, 2010	Vol. 23, 3717–3755
42	P. Morabito Statement of Assets & Liabilities as of May 5, 2009	Vol. 23, 3756–3756
43	March 10, 2010 email chain between Afshar and Takemoto RE: Current Personal Financial Statement	Vol. 23, 3757–3758
44	Salazar Net Worth Report (dated 03/15/2011)	Vol. 23, 3759–3772
45	Purchase and Sale Agreement	Vol. 23, 3773–3780
46	First Amendment to Purchase and Sale Agreement	Vol. 23, 3781–3782
47	Panorama – Estimated Settlement Statement	Vol. 23, 3783–3792
48	El Camino – Final Settlement Statement	Vol. 23, 3793–3793
49	Los Olivos – Final Settlement Statement	Vol. 23, 3794–3794
50	Deed for Transfer of Panorama Property	Vol. 23, 3795–3804
51	Deed for Transfer for Los Olivos	Vol. 23, 3805–3806
52	Deed for Transfer of El Camino	Vol. 23, 3807–3808
53	Kimmel Appraisal Report for Panorama and Clayton	Vol. 23, 3809–3886
54	Bill of Sale – Panorama	Vol. 23, 3887–3890
55	Bill of Sale – Mary Fleming	Vol. 23, 3891–3894
56	Bill of Sale – El Camino	Vol. 23, 3895–3898

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
57	Bill of Sale – Los Olivos	Vol. 23, 3899–3902
58	Declaration of Value and Transfer Deed of 8355 Panorama (recorded 12/31/2012)	Vol. 23, 3903–3904
60	Baruk Properties Operating Agreement	Vol. 23, 3905–3914
61	Baruk Membership Transfer Agreement	Vol. 24, 3915–3921
62	Promissory Note for \$1,617,050 (dated 10/01/2010)	Vol. 24, 3922–3924
63	Baruk Properties/Snowshoe Properties, Certificate of Merger (filed 10/04/2010)	Vol. 24, 3925–3926
64	Baruk Properties/Snowshoe Properties, Articles of Merger	Vol. 24, 3927–3937
65	Grant Deed from Snowshoe to Bayuk Living Trust; Doc No. 2010-0531071 (recorded 11/04/2010)	Vol. 24, 3938–3939
66	Grant Deed – 1461 Glenneyre; Doc No. 2010000511045 (recorded 10/08/2010)	Vol. 24, 3940–3941
67	Grant Deed – 570 Glenneyre; Doc No. 2010000508587 (recorded 10/08/2010)	Vol. 24, 3942–3944
68	Attorney File re: Conveyance between Woodland Heights and Arcadia Living Trust	Vol. 24, 3945–3980
69	October 24, 2011 email from P. Morabito to Vacco RE: Attorney Client Privileged Communication	Vol. 24, 3981–3982

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
70	November 10, 2011 email chain between Vacco and P. Morabito RE: Baruk Properties, LLC/Paul Morabito/Bank of America, N.A.	Vol. 24, 3983–3985
71	Bayuk First Ledger	Vol. 24, 3986–3987
72	Amortization Schedule	Vol. 24, 3988–3990
73	Bayuk Second Ledger	Vol. 24, 3991–3993
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75	March 30, 2012 email from Vacco to Bayuk RE: Letter to BOA	Vol. 24, 4054–4055
76	March 10, 2010 email chain between P. Morabito and jon@aim13.com RE: Strictly Confidential	Vol. 24, 4056–4056
77	May 20, 2010 email chain between P. Morabito, Vacco and Michael Pace RE: Proceed with placing a Binding Bid on June 22nd with ExxonMobil	Vol. 24, 4057–4057
78	Morabito Personal Financial Statement May 2010	Vol. 24, 4058–4059
79	June 28, 2010 email from P. Morabito to George Garner RE: ExxonMobil Chicago Market Business Plan Review	Vol. 24, 4060–4066
80	Shareholder Interest Purchase Agreement	Vol. 24, 4067–4071
81	Plan of Merger of Consolidated Western Corporation with and Into Superpumper, Inc.	Vol. 24, 4072–4075

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84	Unanimous Written Consent of the Directors and Shareholders of Consolidated Western Corporation	Vol. 24, 4081–4083
85	Arizona Corporation Commission Letter dated October 21, 2010	Vol. 24, 4084–4091
86	Nevada Articles of Merger	Vol. 24, 4092–4098
87	New York Creation of Snowshoe	Vol. 24, 4099–4103
88	April 26, 2012 email from Vacco to Afshar RE: Ownership Structure of SPI	Vol. 24, 4104–4106
90	September 30, 2010 Matrix Retention Agreement	Vol. 24, 4107–4110
91	McGovern Expert Report	Vol. 25, 4111–4189
92	Appendix B to McGovern Report – Source 4 – Budgets	Vol. 25, 4190–4191
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105	Superpumper Successor Note in the amount of \$939,000 (dated 02/01/2011)	Vol. 25, 4196–4197

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106	Superpumper Stock Power transfers to S. Morabito and Bayuk (dated 01/01/2011)	Vol. 25, 4198–4199
107	<i>Declaration of P. Morabito in Support of Opposition to Motion of JH, Inc., Jerry Herbst, and Berry- Hinckley Industries for Order Prohibiting Debtor from Using, Acquiring or Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee, Case 13-51237, ECF No. 22 (filed 07/01/2013)</i>	Vol. 25, 4200–4203
108	October 12, 2012 email between P. Morabito and Bernstein RE: 2011 Return	Vol. 25, 4204–4204
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110	P. Morabito – Term Note in the amount of \$939,000.000 (dated 09/01/2010)	Vol. 25, 4214–4214
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112	Consent Agreement (dated 12/28/2010)	Vol. 25, 4245–4249
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122	Salvatore Morabito Term Note \$2,563,542.00 as of December 31, 2010	Vol. 26, 4324–4325
123	Edward Bayuk Term Note \$2,580,500.00 as of December 31, 2010	Vol. 26, 4326–4327
125	April 21, 2011 Management letter	Vol. 26, 4328–4330
126	Bayuk and S. Morabito Statements of Assets & Liabilities as of February 1, 2011	Vol. 26, 4331–4332
127	January 6, 2012 email from Bayuk to Lovelace RE: Letter of Credit	Vol. 26, 4333–4335
128	January 6, 2012 email from Vacco to Bernstein	Vol. 26, 4336–4338
129	January 7, 2012 email from Bernstein to Lovelace	Vol. 26, 4339–4343
130	March 18, 2012 email from P. Morabito to Vacco	Vol. 26, 4344–4344
131	April 21, 2011 Proposed Acquisition of Nella Oil	Vol. 26, 4345–4351
132	April 15, 2011 email chain between P. Morabito and Vacco	Vol. 26, 4352

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134	April 16, 2012 email from Vacco to Morabito	Vol. 26, 4354–4359
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137	August 24, 2011 email from Vacco to P. Morabito RE: Tim Haves	Vol. 26, 4366
138	November 11, 2011 email from Vacco to P. Morabito RE: Getting Trevor's commitment to sign	Vol. 26, 4367
139	November 16, 2011 email from P. Morabito to Vacco RE: Vacco's litigation letter	Vol. 26, 4368
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141	December 7, 2011 email from Vacco to P. Morabito RE: Moreno	Vol. 26, 4371
142	February 10, 2012 email chain between P. Morabito Wells, and Vacco RE: 1461 Glenneyre Street - Sale	Vol. 26, 4372–4375
143	April 20, 2012 email from P. Morabito to Bayuk RE: BofA	Vol. 26, 4376
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148	September 4, 2012 email from Bayuk to Vacco RE: Wire	Vol. 26, 4423–4426
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152	September 3, 2012 email from P. Morabito to Vacco RE: Wire	Vol. 26, 4435
153	March 14, 2013 email chain between P. Morabito and Vacco RE: BHI Hinckley	Vol. 26, 4436
154	Paul Morabito 2009 Tax Return	Vol. 26, 4437–4463
155	Superpumper Form 8879-S tax year ended December 31, 2010	Vol. 26, 4464–4484
156	2010 U.S. S Corporation Tax Return for Consolidated Western Corporation	Vol. 27, 4485–4556
157	Snowshoe form 8879-S for year ended December 31, 2010	Vol. 27, 4557–4577
158	Snowshoe Form 1120S 2011 Amended Tax Return	Vol. 27, 4578–4655

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161	December 18, 2012 email from Vacco to P. Morabito RE: Attorney Client Privileged Communication	Vol. 27, 4659
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174	October 15, 2015 Certificate of Service of copy of Lippes Mathias Wexler Friedman’s Response to Subpoena	Vol. 27, 4670
175	Order Granting Motion to Compel Responses to Deposition Questions ECF No. 502; Case No. 13-51237-gwz (filed 02/03/2016)	Vol. 27, 4671–4675
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189	Mortgage – Mary Fleming	Vol. 28, 4864
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191	Settlement Statement – 370 Los Olivos	Vol. 28, 4866
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193	Mortgage – 8355 Panorama Drive	Vol. 28, 4869–4870
194	Compass – Certificate of Custodian of Records (dated 12/21/2016)	Vol. 28, 4871–4871
196	June 6, 2014 Declaration of Sam Morabito – Exhibit 1 to Snowshoe Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction – filed in Case No. CV13-02663	Vol. 28, 4872–4874
197	June 19, 2014 Declaration of Sam Morabito – Exhibit 1 to Superpumper Motion to Dismiss Complaint for Lack of Personal Jurisdiction – filed in Case No. CV13-02663	Vol. 28, 4875–4877
198	September 22, 2017 Declaration of Sam Morabito – Exhibit 22 to Defendants’ SSOF in Support of Opposition to Plaintiff’s MSJ – filed in Case No. CV13-02663	Vol. 28, 4878–4879

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225	Bank of America Records for Edward Bayuk (dated 09/05/2012)	Vol. 28, 4887–4897
226	June 11, 2007 Wholesale Marketer Agreement	Vol. 29, 4898–4921
227	May 25, 2006 Wholesale Marketer Facility Development Incentive Program Agreement	Vol. 29, 4922–4928
228	June 2007 Master Lease Agreement – Spirit SPE Portfolio and Superpumper, Inc.	Vol. 29, 4929–4983
229	Superpumper Inc 2008 Financial Statement (dated 12/31/2008)	Vol. 29, 4984–4996
230	November 9, 2009 email from P. Morabito to Bernstein, Yalaman RE: Jan Friederich – entered into Consulting Agreement	Vol. 29, 4997
231	September 30, 2010, Letter from Compass to Superpumper, Morabito, CWC RE: reducing face amount of the revolving note	Vol. 29, 4998–5001
232	October 15, 2010, letter from Quarles & Brady to Vacco RE: Revolving Loan Documents and Term Loan Documents between Superpumper and Compass Bank	Vol. 29, 5002–5006

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235	August 31, 2010 Superpumper Inc., Valuation of 100 percent of the common equity in Superpumper, Inc on a controlling marketable basis	Vol. 29, 5014–5059
236	June 18, 2014 email from S. Morabito to Vanek (WF) RE: Analysis of Superpumper Acquisition in 2010	Vol. 29, 5060–5061
241	Superpumper March 2010 YTD Income Statement	Vol. 29, 5062–5076
244	Assignment Agreement for \$939,000 Morabito Note	Vol. 29, 5077–5079
247	July 1, 2011 Third Amendment to Forbearance Agreement Superpumper and Compass Bank	Vol. 29, 5080–5088
248	Superpumper Cash Contributions January 2010 thru September 2015 – Bayuk and S. Morabito	Vol. 29, 5089–5096
252	October 15, 2010 Letter from Quarles & Brady to Vacco RE: Revolving Loan documents and Term Loan documents between Superpumper Prop. and Compass Bank	Vol. 29, 5097–5099
254	Bank of America – S. Morabito SP Properties Sale, SP Purchase Balance	Vol. 29, 5100
255	Superpumper Prop. Final Closing Statement for 920 Mountain City Hwy, Elko, NV	Vol. 29, 5101
256	September 30, 2010 Raffles Insurance Limited Member Summary	Vol. 29, 5102

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257	Equalization Spreadsheet	Vol. 30, 5103
258	November 9, 2005 Grant, Bargain and Sale Deed; Doc #3306300 for Property Washoe County	Vol. 30, 5104–5105
260	January 7, 2016 Budget Summary – Panorama Drive	Vol. 30, 5106–5107
261	Mary 22, 2006 Compilation of Quotes and Invoices Quote of Valley Drapery	Vol. 30, 5108–5116
262	Photos of 8355 Panorama Home	Vol. 30, 5117–5151
263	Water Rights Deed (Document #4190152) between P. Morabito, E. Bayuk, Grantors, RCA Trust One Grantee (recorded 12/31/2012)	Vol. 30, 5152–5155
265	October 1, 2010 Bank of America Wire Transfer –Bayuk – Morabito \$60,117	Vol. 30, 5156
266	October 1, 2010 Check #2354 from Bayuk to P. Morabito for \$29,383 for 8355 Panorama funding	Vol. 30, 5157–5158
268	October 1, 2010 Check #2356 from Bayuk to P. Morabito for \$12,763 for 370 Los Olivos Funding	Vol. 30, 5159–5160
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270	Bayuk Payment Ledger Support Documents Checks and Bank Statements	Vol. 31, 5163–5352
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277	Assessor's Map/Home Comparisons for 8355 Panorama Drive, Reno, NV	Vol. 32, 5401–5437
278	December 3, 2007 Case Docket for CV07-02764	Vol. 32, 5438–5564
280	May 25, 2011 Stipulation Regarding the Imposition of Punitive Damages; Case No. CV07-02764 (filed 05/25/2011)	Vol. 33, 5565–5570
281	Work File for September 24, 2010 Appraisal of 8355 Panorama Drive, Reno, NV	Vol. 33, 5571–5628
283	January 25, 2016 Expert Witness Report Leonard v. Superpumper Snowshoe	Vol. 33, 5629–5652
284	February 29, 2016 Defendants' Rebuttal Expert Witness Disclosure	Vol. 33, 5653–5666
294	October 5, 2010 Lippes, Mathias Wexler Friedman, LLP, Invoices to P. Morabito	Vol. 33, 5667–5680
295	P. Morabito 2010 Tax Return (dated 10/16/2011)	Vol. 33, 5681–5739
296	December 31, 2010 Superpumper Inc. Note to Financial Statements	Vol. 33, 5740–5743
297	December 31, 2010 Superpumper Consultations	Vol. 33, 5744

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301	September 15, 2010 email from Vacco to P. Morabito RE: Tomorrow	Vol. 33, 5749–5752
303	Bankruptcy Court District of Nevada Claims Register Case No. 13-51237	Vol. 33, 5753–5755
304	April 14, 2018 email from Allen to Krausz RE: Superpumper	Vol. 33, 5756–5757
305	Subpoena in a Case Under the Bankruptcy Code to Robison, Sharp, Sullivan & Brust issued in Case No. BK-N-13-51237-GWZ	Vol. 33, 5758–5768
306	August 30, 2018 letter to Mark Weisenmiller, Esq., from Frank Gilmore, Esq.,	Vol. 34, 5769
307	Order Granting Motion to Compel Compliance with the Subpoena to Robison, Sharp, Sullivan & Brust filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5770–5772
308	Response of Robison, Sharp, Sullivan & Brust's to Subpoena filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5773–5797
309	Declaration of Frank C. Gilmore in support of Robison, Sharp, Sullivan & Brust's Opposition to Motion for Order Holding Robison in Contempt filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5798–5801
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Minutes of November 2, 2018, Non-Jury Trial, Day 5 (filed 11/08/2018)	Vol. 39, 6818–7007
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Minutes of November 6, 2018, Non-Jury Trial, Day 7 (filed 11/08/2018)	Vol. 41, 7170–7269
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Plaintiff’s Motion to Reopen Evidence (filed 01/30/2019)		Vol. 46, 7894–7908
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Exhibit	Document Description	
1	Declaration of Gabrielle A. Hamm, Esq. in Support of Plaintiff’s Motion to Reopen	Vol. 46, 7909–7913
1-A	September 21, 2017 Declaration of Salvatore Morabito	Vol. 46, 7914–7916
1-B	Defendants’ Proposed Findings of Fact, Conclusions of Law, and Judgment (Nov. 26, 2018)	Vol. 46, 7917–7957
1-C	Judgment on the First and Second Causes of Action; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 123 (April 30, 2018)	Vol. 46, 7958–7962
1-D	Amended Findings of Fact and Conclusions of Law in Support of Judgment Regarding Plaintiffs’ First and Second Causes of Action; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 126 (April 30, 2018)	Vol. 46, 7963–7994
1-E	Motion to Compel Compliance with the Subpoena to Robison Sharp Sullivan Brust; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 191 (Sept. 10, 2018)	Vol. 46, 7995–8035

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1-F	Order Granting Motion to Compel Compliance with the Subpoena to Robison Sharp Sullivan Brust; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 229 (Jan. 3, 2019)	Vol. 46, 8036–8039
1-G	Response of Robison, Sharp, Sullivan & Brust[] To Subpoena (including RSSB_000001 – RSSB_000031) (Jan. 18, 2019)	Vol. 46, 8040–8067
1-H	Excerpts of Deposition Transcript of Sam Morabito as PMK of Snowshoe Petroleum, Inc. (Oct. 1, 2015)	Vol. 46, 8068–8076
Errata to: Plaintiff's Motion to Reopen Evidence (filed 01/30/2019)		Vol. 47, 8077–8080
Exhibit to Errata to: Plaintiff's Motion to Reopen Evidence		
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1	Plaintiff's Motion to Reopen Evidence	Vol. 47, 8081–8096
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Order Shortening Time on Plaintiff's Motion to Reopen Evidence and for Expedited Hearing (filed 02/04/2019)		Vol. 47, 8103–8105
Supplement to Plaintiff's Motion to Reopen Evidence (filed 02/04/2019)		Vol. 47, 8106–8110

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
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Exhibit	Document Description	
1	Supplemental Declaration of Gabrielle A. Hamm, Esq. in Support of Plaintiff's Motion to Reopen Evidence (filed 02/04/2019)	Vol. 47, 8111–8113
1-I	Declaration of Frank C. Gilmore in Support of Robison, Sharp Sullivan & Brust's Opposition to Motion for Order Holding Robison in Contempt; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 259 (Jan. 30, 2019)	Vol. 47, 8114–8128
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Plaintiff's Reply to Defendants' Response to Motion to Reopen Evidence (filed 02/07/2019)		Vol. 47, 8136–8143
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[Defendants' Proposed Amended] Findings of Fact, Conclusions of Law, and Judgment (filed 03/08/2019)		Vol. 47, 8225–8268
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Memorandum of Costs and Disbursements (filed 04/11/2019)		Vol. 48, 8341–8347
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Exhibit	Document Description	
1	Ledger of Costs	Vol. 48, 8348–8370
Application for Attorneys’ Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019)		Vol. 48, 8371–8384
Exhibits to Application for Attorneys’ Fees and Costs Pursuant to NRCP 68		
Exhibit	Document Description	
1	Declaration of Teresa M. Pilatowicz In Support of Plaintiff’s Application for Attorney’s Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019)	Vol. 48, 8385–8390
2	Plaintiff’s Offer of Judgment to Defendants (dated 05/31/2016)	Vol. 48, 8391–8397
3	Defendant’s Rejection of Offer of Judgment by Plaintiff (dated 06/15/2016)	Vol. 48, 8398–8399
4	Log of time entries from June 1, 2016 to March 28, 2019	Vol. 48, 8400–8456

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
5	Plaintiff's Memorandum of Costs and Disbursements (filed 04/11/2019)	Vol. 48, 8457–8487
Motion to Retax Costs (filed 04/15/2019)		Vol. 49, 8488–8495
Plaintiff's Opposition to Motion to Retax Costs (filed 04/17/2019)		Vol. 49, 8496–8507
Exhibits to Plaintiff's Opposition to Motion to Retax Costs		
Exhibit	Document Description	
1	Declaration of Teresa M. Pilatowicz In Support of Opposition to Motion to Retax Costs (filed 04/17/2019)	Vol. 49, 8508–8510
2	Summary of Photocopy Charges	Vol. 49, 8511–8523
3	James L. McGovern Curriculum Vitae	Vol. 49, 8524–8530
4	McGovern & Greene LLP Invoices	Vol. 49, 8531–8552
5	Buss-Shelger Associates Invoices	Vol. 49, 8553–8555
Reply in Support of Motion to Retax Costs (filed 04/22/2019)		Vol. 49, 8556–8562
Opposition to Application for Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 04/25/2019)		Vol. 49, 8563–8578
Exhibit to Opposition to Application for Attorneys' Fees and Costs Pursuant to NRCP 68		
Exhibit	Document Description	
1	Plaintiff's Bill Dispute Ledger	Vol. 49, 8579–8637

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Defendants, Salvatore Morabito, Snowshoe Petroleum, Inc., and Superpumper, Inc.'s Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 04/25/2019)		Vol. 49, 8638–8657
Defendant, Edward Bayuk's Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 04/26/2019)		Vol. 50, 8658–8676
Exhibits to Edward Bayuk's Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60		
Exhibit	Document Description	
1	February 27, 2019 email with attachments	Vol. 50, 8677–8768
2	Declaration of Frank C. Gilmore in Support of Edward Bayuk's Motion for New Trial (filed 04/26/2019)	Vol. 50, 8769–8771
3	February 27, 2019 email from Marcy Trabert	Vol. 50, 8772–8775
4	February 27, 2019 email from Frank Gilmore to eturner@Gtg.legal RE: Friday Trial	Vol. 50, 8776–8777
Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 04/30/2019)		Vol. 50, 8778–8790
Exhibit to Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68		
Exhibit	Document Description	
1	Case No. BK-13-51237-GWZ, ECF Nos. 280, 282, and 321	Vol. 50, 8791–8835

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Plaintiff's Opposition to Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 05/07/2019)		Vol. 51, 8836–8858
Defendants, Salvatore Morabito, Snowshoe Petroleum, Inc., and Superpumper, Inc.'s Reply in Support of Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCp 52, 59, and 60 (filed 05/14/2019)		Vol. 51, 8859–8864
Declaration of Edward Bayuk Claiming Exemption from Execution (filed 06/28/2019)		Vol. 51, 8865–8870
Exhibits to Declaration of Edward Bayuk Claiming Exemption from Execution		
Exhibit	Document Description	
1	Copy of June 22, 2019 Notice of Execution and two Write of Executions	Vol. 51, 8871–8896
2	Declaration of James Arthur Gibbons Regarding his Attestation, Witness and Certification on November 12, 2005 of the Spendthrift Trust Amendment to the Edward William Bayuk Living Trust (dated 06/25/2019)	Vol. 51, 8897–8942
Notice of Claim of Exemption from Execution (filed 06/28/2019)		Vol. 51, 8943–8949
Edward Bayuk's Declaration of Salvatore Morabito Claiming Exemption from Execution (filed 07/02/2019)		Vol. 51, 8950–8954
Exhibits to Declaration of Salvatore Morabito Claiming Exemption from Execution		
Exhibit	Document Description	
1	Las Vegas June 22, 2019 letter	Vol. 51, 8955–8956

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
2	Writs of execution and the notice of execution	Vol. 51, 8957–8970
Minutes of June 24, 2019 telephonic hearing on Decision on Submitted Motions (filed 07/02/2019)		Vol. 51, 8971–8972
Salvatore Morabito’s Notice of Claim of Exemption from Execution (filed 07/02/2019)		Vol. 51, 8973–8976
Edward Bayuk’s Third Party Claim to Property Levied Upon NRS 31.070 (filed 07/03/2019)		Vol. 51, 8977–8982
Order Granting Plaintiff’s Application for an Award of Attorneys’ Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019)		Vol. 51, 8983–8985
Order Granting in part and Denying in part Motion to Retax Costs (filed 07/10/2019)		Vol. 51, 8986–8988
Plaintiff’s Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5) (filed 07/11/2019)		Vol. 52, 8989–9003
Exhibits to Plaintiff’s Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5)		
Exhibit	Document Description	
1	Declaration of Gabrielle A. Hamm, Esq.	Vol. 52, 9004–9007
2	11/30/2011 Tolling Agreement – Edward Bayuk	Vol. 52, 9008–9023
3	11/30/2011 Tolling Agreement – Edward William Bayuk Living Trust	Vol. 52, 9024–9035

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
4	Excerpts of 9/28/2015 Deposition of Edward Bayuk	Vol. 52, 9036–9041
5	Edward Bayuk, as Trustee of the Edward William Bayuk Living Trust’s Responses to Plaintiff’s First Set of Requests for Production, served 9/24/2015	Vol. 52, 9042–9051
6	8/26/2009 Grant Deed (Los Olivos)	Vol. 52, 9052–9056
7	8/17/2018 Grant Deed (El Camino)	Vol. 52, 9057–9062
8	Trial Ex. 4 (Confession of Judgment)	Vol. 52, 9063–9088
9	Trial Ex. 45 (Purchase and Sale Agreement, dated 9/28/2010)	Vol. 52, 9089–9097
10	Trial Ex. 46 (First Amendment to Purchase and Sale Agreement, dated 9/29/2010)	Vol. 52, 9098–9100
11	Trial Ex. 51 (Los Olivos Grant Deed recorded 10/8/2010)	Vol. 52, 9101–9103
12	Trial Ex. 52 (El Camino Grant Deed recorded 10/8/2010)	Vol. 52, 9104–9106
13	Trial Ex. 61 (Membership Interest Transfer Agreement, dated 10/1/2010)	Vol. 52, 9107–9114
14	Trial Ex. 62 (\$1,617,050.00 Promissory Note)	Vol. 52, 9115–9118
15	Trial Ex. 65 (Mary Fleming Grant Deed recorded 11/4/2010)	Vol. 52, 9119–9121
Notice of Entry of Order Denying Defendants’ Motions for New Trial and/or to Alter or Amend Judgment (filed 07/16/2019)		Vol. 52, 9122–9124

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Exhibit to Notice of Entry of Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment		
Exhibit	Document Description	
1	Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 07/10/2019)	Vol. 52, 9125–9127
Notice of Entry of Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/16/2019)		Vol. 52, 9128–9130
Exhibit to Notice of Entry of Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68		
Exhibit	Document Description	
1	Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019)	Vol. 52, 9131–9134
Notice of Entry of Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/16/2019)		Vol. 52, 9135–9137
Exhibit to Notice of Entry of Order Granting in Part and Denying in Part Motion to Retax Costs		
Exhibit	Document Description	
1	Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/10/2019)	Vol. 52, 9138–9141

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Plaintiff's Objection to Notice of Claim of Exemption from Execution Filed by Salvatore Morabito and Request for Hearing (filed 07/16/2019)		Vol. 52, 9142–9146
Reply to Objection to Claim of Exemption and Third Party Claim to Property Levied Upon (filed 07/17/2019)		Vol. 52, 9147–9162
Exhibits to Reply to Objection to Claim of Exemption and Third Party Claim to Property Levied Upon		
Exhibit	Document Description	
1	March 3, 2011 Deposition Transcript of P. Morabito	Vol. 52, 9163–9174
2	Mr. Bayuk's September 23, 2014 responses to Plaintiff's first set of requests for production	Vol. 52, 9175–9180
3	September 28, 2015 Deposition Transcript of Edward Bayuk	Vol. 52, 9181–9190
Reply to Plaintiff's Objection to Notice of Claim of Exemption from Execution (filed 07/18/2019)		Vol. 52, 9191–9194
Declaration of Service of Till Tap, Notice of Attachment and Levy Upon Property (filed 07/29/2019)		Vol. 52, 9195
Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/2019)		Vol. 52, 9196–9199
Exhibits to Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim		
Exhibit	Document Description	
1	Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim	Vol. 52, 9200–9204

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
2	Bayuk and the Bayuk Trust's proposed Order Denying Claim of Exemption and Third-Party Claim	Vol. 52, 9205–9210
3	July 30, 2019 email evidencing Bayuk, through counsel Jeffrey Hartman, Esq., requesting until noon on July 31, 2019 to provide comments.	Vol. 52, 9211–9212
4	July 31, 2019 email from Teresa M. Pilatowicz, Esq. Bayuk failed to provide comments at noon on July 31, 2019, instead waiting until 1:43 p.m. to send a redline version with proposed changes after multiple follow ups from Plaintiff's counsel on July 31, 2019	Vol. 52, 9213–9219
5	A true and correct copy of the original Order and Bayuk Changes	Vol. 52, 9220–9224
6	A true and correct copy of the redline run by Plaintiff accurately reflecting Bayuk's proposed changes	Vol. 52, 9225–9229
7	Email evidencing that after review of the proposed revisions, Plaintiff advised Bayuk, through counsel, that Plaintiff agree to certain proposed revisions, but the majority of the changes were unacceptable as they did not reflect the Court's findings or evidence before the Court.	Vol. 52, 9230–9236
Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/2019)		Vol. 53, 9237–9240

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Exhibits to Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim		
Exhibit	Document Description	
1	Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim	Vol. 53, 9241–9245
2	Defendant's comments on Findings of Fact	Vol. 53, 9246–9247
3	Defendant's Proposed Order Denying Claim of Exemption and Third-Party Claim	Vol. 53, 9248–9252
Minutes of July 22, 2019 hearing on Objection to Claim for Exemption (filed 08/02/2019)		Vol. 53, 9253
Order Denying Claim of Exemption (filed 08/02/2019)		Vol. 53, 9254–9255
Bayuk's Case Appeal Statement (filed 08/05/2019)		Vol. 53, 9256–9260
Bayuk's Notice of Appeal (filed 08/05/2019)		Vol. 53, 9261–9263
Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Case Appeal Statement (filed 08/05/2019)		Vol. 53, 9264–9269
Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Notice of Appeal (filed 08/05/2019)		Vol. 53, 9270–9273

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Exhibits to Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Notice of Appeal		
Exhibit	Document Description	
1	Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019)	Vol. 53, 9274–9338
2	Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 07/10/2019)	Vol. 53, 9339–9341
3	Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/10/2019)	Vol. 53, 9342–9345
4	Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCp 68 (filed 07/10/2019)	Vol. 53, 9346–9349
Plaintiff's Reply to Defendants' Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim		Vol. 53, 9350–9356
Order Denying Claim of Exemption and Third-Party Claim (08/09/2019)		Vol. 53, 9357–9360
Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim (filed 08/09/2019)		Vol. 53, 9361–9364
Exhibit to Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim		
Exhibit	Document Description	
1	Order Denying Claim of Exemption and Third-Party Claim (08/09/2019)	Vol. 53, 9365–9369

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Notice of Entry of Order Denying Claim of Exemption (filed 08/12/2019)		Vol. 53, 9370–9373
Exhibit to Notice of Entry of Order Denying Claim of Exemption		
Exhibit	Document Description	
1	Order Denying Claim of Exemption (08/02/2019)	Vol. 53, 9374–9376
Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration (filed 08/19/2019)		Vol. 54, 9377–9401
Exhibits to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration		
Exhibit	Document Description	
1	Order Denying Claim of Exemption and Third Party Claim (filed 08/09/19)	Vol. 54, 9402–9406
2	Spendthrift Trust Amendment to the Edward William Bayuk Living Trust (dated 11/12/05)	Vol. 54, 9407–9447
3	Spendthrift Trust Agreement for the Arcadia Living Trust (dated 10/14/05)	Vol. 54, 9448–9484
4	Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/10)	Vol. 54, 9485–9524
5	P. Morabito's Supplement to NRCP 16.1 Disclosures (dated 03/01/11)	Vol. 54, 9525–9529

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
6	Transcript of March 3, 2011 Deposition of P. Morabito	Vol. 55, 9530–9765
7	Documents Conveying Real Property	Vol. 56, 9766–9774
8	Transcript of July 22, 2019 Hearing	Vol. 56, 9775–9835
9	Tolling Agreement JH and P. Morabito (partially executed 11/30/11)	Vol. 56, 9836–9840
10	Tolling Agreement JH and Arcadia Living Trust (partially executed 11/30/11)	Vol. 56, 9841–9845
11	Excerpted Pages 8–9 of Superpumper Judgment (filed 03/29/19)	Vol. 56, 9846–9848
12	Petitioners' First Set of Interrogatories to Debtor (dated 08/13/13)	Vol. 56, 9849–9853
13	Tolling Agreement JH and Edward Bayuk (partially executed 11/30/11)	Vol. 56, 9854–9858
14	Tolling Agreement JH and Bayuk Trust (partially executed 11/30/11)	Vol. 56, 9859–9863
15	Declaration of Mark E. Lehman, Esq. (dated 03/21/11)	Vol. 56, 9864–9867
16	Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco	Vol. 56, 9868–9871
17	Assignment and Assumption Agreement (dated 07/03/07)	Vol. 56, 9872–9887
18	Order Denying Morabito's Claim of Exemption (filed 08/02/19)	Vol. 56, 9888–9890

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Errata to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration (filed 08/20/2019)		Vol. 57, 9891–9893
Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 08/30/2019)		Vol. 57, 9894–9910
Errata to Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 08/30/2019)		Vol. 57, 9911–9914
Exhibits to Errata to Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085		
Exhibit	Document Description	
1	Declaration of Gabrielle A. Hamm, Esq.	Vol. 57, 9915–9918
2	Plaintiff's Amended NRCP 16.1 Disclosures (February 19, 2016)	Vol. 57, 9919–9926
3	Plaintiff's Fourth Supplemental NRCP 16.1 Disclosures (November 15, 2016)	Vol. 57, 9927–9930
4	Plaintiff's Fifth Supplemental NRCP 16.1 Disclosures (December 21, 2016)	Vol. 57, 9931–9934
5	Plaintiff's Sixth Supplemental NRCP 16.1 Disclosures (March 20, 2017)	Vol. 57, 9935–9938

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Reply in Support of Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs (filed 09/04/2019)		Vol. 57, 9939–9951
Exhibits to Reply in Support of Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs		
Exhibit	Document Description	
19	Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19)	Vol. 57, 9952–9993
20	Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19)	Vol. 57, 9994–10010
Order Denying Defendants’ Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff’s Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/2019)		Vol. 57, 10011–10019
Bayuk’s Case Appeal Statement (filed 12/06/2019)		Vol. 57, 10020–10026
Bayuk’s Notice of Appeal (filed 12/06/2019)		Vol. 57, 10027–10030

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Exhibits to Bayuk's Notice of Appeal		
Exhibit	Document Description	
1	Order Denying [Morabito's] Claim of Exemption (filed 08/02/19)	Vol. 57, 10031–10033
2	Order Denying [Bayuk's] Claim of Exemption and Third Party Claim (filed 08/09/19)	Vol. 57, 10034–10038
3	Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/19)	Vol. 57, 10039–10048
Notice of Entry of Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 12/23/2019)		Vol. 57, 10049–10052
Exhibit to Notice of Entry of Order		
Exhibit	Document Description	
A	Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/19)	Vol. 57, 10053–10062
Docket Case No. CV13-02663		Vol. 57, 10063–10111

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IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

JH, INC., a Nevada corporation; JERRY
HERBST, an individual; and BERRY-
HINCKLEY INDUSTRIES, a Nevada
corporation

CASE NO.: CV13-02663

DEPT. NO.: B1

Plaintiffs,

vs.

PAUL MORABITO, individually and as
Trustee of the ARCADIA LIVING TRUST;
SUPERPUMPER, INC., an Arizona
corporation; EDWARD BAYUK, individually
and as Trustee of the EDWARD WILLIAM
BAYUK LIVING TRUST; and SNOWSHOE
PETROLEUM, INC., a New York
corporation,

Defendants.

DEFENDANT SUPERPUMPER, INC.'S REPLY IN SUPPORT OF MOTION TO
DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION
(NRCp 12(b)(2))

Defendant Superpumper, Inc. ("Superpumper"), by and through its attorneys of
record, hereby Replies in support of its Motion for Order dismissing Plaintiff's Complaint
against it, on the basis that this Court lacks personal jurisdiction pursuant to Nevada's
long-arm statute. This Reply is made and supported by NRCp 12(b)(2), and the

Memorandum of Points and Authorities below.

I. INTRODUCTION

Plaintiff's JH, Inc., Jerry Herbst, and Berry-Hinckley Enterprises (collectively "Herbst") acknowledge in their Opposition that Superpumper was nothing more than a pawn in the alleged scheme. Superpumper is an Arizona entity that has never done anything except operate gas stations and convenience stores in Arizona. Superpumper has a legitimate business, with employees, offices, clients, and vendors. That it was once owned by a Nevada corporation that was at one time owned by Paul Morabito (the alleged fraudulent mastermind), without more, does not make jurisdiction over Superpumper reasonable or appropriate.

Herbst recognizes that the only tie Superpumper has to this State is that prior to 2010, Superpumper shares were held by Consolidated Nevada Corporation ("CNC"). However, in order to intimate non-existent facts, Herbst scoured the books of the various entities and located three transactions – in 2007 – where Superpumper's fees were apparently paid for by BHI, a Nevada entity. This, without more, is wholly insufficient to hale Superpumper into Court, in a jurisdiction where it has never done business, to be made to answer for the alleged schemes to which it had no involvement. For these reasons, the Motion to Dismiss must be granted.

II. ARGUMENT

A. The 2006-2007 Transactions Between Superpumper And BHI Are Entirely Irrelevant To The Issues At Hand.

Even if it is true that at some point in 2006 or 2007 BHI paid the legal or accounting fees for Superpumper, the lack of relevance of such a fact is plainly evident. Herbst contends that in 2010 Superpumper shares were owned by CNC, and that Superpumper was then merged into its parent company, and then the shares were sold to Snowshoe Petroleum. Those are the only operative facts upon which Superpumper is alleged to be liable to Herbst. As such, the Court must look to the Complaint to determine which facts are relevant to the issue of specific jurisdiction in order to

1 determine whether the cause of action does indeed “arise from the consequences in the
2 forum state of the defendant's activities.” *Trump v. Eighth Judicial Dist. Court*, 109 Nev.
3 687, 700 (1993). A review of the allegations in the Complaint evidences immediately that
4 Superpumper’s connection with BHI in 2006-2007 has no relation to the claim that
5 Superpumper was involved in an effort to fraudulently transfer and hide assets in order to
6 avoid a judgment that was obtained by Herbst in late 2010.

7 Indeed, Herbst must concede that even if Superpumper had some contact with
8 the State of Nevada, such contact is irrelevant unless that contact is related to the course
9 of events that led to the claims against them. *Munley v. Dist. Court*, 104 Nev. 492,495-
10 96 (1988). This is the well-settled law on specific jurisdiction, and Herbst cannot
11 overcome this fact. Only contact with the forum state that has some bearing or
12 consequence to the causes of action is relevant for purposes of personal jurisdiction.
13 Whatever Superpumper did or was doing in 2006 with respect to BHI is not sufficient to
14 create reasonable jurisdiction where it otherwise does not exist.

15 Moreover, Herbst fails to explain why having a Nevada corporation make three
16 payments for accounting or legal fees would be sufficient minimum contacts to justify
17 jurisdiction here. All of the cases talk about the “minimum contacts” in the sense of
18 evaluating the quality of the contacts, and that they be intimately related to the forum,
19 and not based on a “random,” “fortuitous,” or “attenuated” relationship. *Trump*, 109 Nev.
20 at 700. Without more, a Nevada corporation’s payment of a few of Superpumper’s
21 attorneys’ fees is not sufficient minimum contacts to exercise jurisdiction over it.

22 **B. Superpumper Is Neither The Alleged Transferor Nor The Alleged**
23 **Transferee.**

24 Herbst would have the Court believe that any person, entity, or chattel that was
25 involved in the alleged Paul Morabito “transfer” should reasonably expect to be haled into
26 Court here. Herbst casts the widest net possible on the hope that the Court will examine
27 all parties contacts with the State, and all the parties relationships with each other, in
28 order to justify bringing Superpumper into this case. First, it is important to note that the

1 requirements of due process mandate that “each defendant's contacts with the forum
2 State must be assessed individually.” *See Rush v. Savchuk*, 444 U.S. 320, 332, 100
3 S.Ct. 571, 579, 62 L.Ed.2d 516 (1980) (“The requirements of International Shoe ... must
4 be met as to each defendant over whom a state court exercises jurisdiction”). Thus, the
5 fact that many defendants are named, and many defendants have various business or
6 family connections to Superpumper is a red-herring. Jurisdiction over Superpumper
7 must stand entirely on Superpumper’s contacts, and on a separate and independent
8 basis for its inclusion here.

9 Second, Superpumper is not alleged to be the transferor or the transferee. The
10 appropriate remedies to Herbst are to look to the transferee who obtained the value of
11 the transfer, or to the transferor who allegedly made the transfer with an intent to hinder
12 the creditor (Herbst). NRS 112.210. As such, Superpumper is not the proper target for
13 Herbst’s claims. Relief can be afforded to Herbst – either through the transferor or the
14 transferee, without the necessity of Superpumper’s involvement in this case. Herbst
15 intent to cast the widest net possible, in order to bring as many potential defendants as
16 possible into the litigation, cannot defeat the requirements of due process that mandate
17 that Superpumper be independently examined for its contacts with the forum state, as
18 those contacts relate to the claims alleged. Superpumper has no contacts with Nevada,
19 and the fact that its shares were once held by a Nevada corporation is not sufficient to
20 force it to appear and defend this case in Nevada.

21 **C. Bringing Superpumper Into This Litigation Does Not Comport With**
22 **Fair Play And Substantial Justice.**

23 In evaluating each of the factors set forth in *Trump*, 107 Nev. at 701, there
24 appears little genuine basis for fairly requiring Superpumper to defend these claims here.
25 Herbst suggests that Nevada has an interest in adjudicating this dispute. (Opposition, p.
26 9:24). What Herbst means is that *Herbst* has an interest in adjudicating this dispute
27 here, because it is convenient for them to do so. Herbst has not given any explanation
28 as to what specific aspect of this case provides Nevada a compelling interest to

1 adjudicate this case that cannot be said by every other state in this country. There is no
2 law or applicable code in Nevada that would be particularly applicable here that cannot
3 be found elsewhere. Herbst has not explained that there is a remedy available under
4 Nevada law that cannot be obtained in a more appropriate jurisdiction. Indeed, the act
5 upon which Herbst has sued is a uniform act that has been around for nearly 100 years
6 and has been adopted in nearly all states. Under Herbst's analysis, all cases filed in
7 Nevada would meet this element without any further analysis. There is nothing special
8 about this case that renders it more appropriately heard in Nevada than elsewhere.

9 The consideration for effective resolution of controversies cannot override the
10 fundamental considerations of due process. Otherwise, these factors would be
11 dispositive of all "minimum contacts" analysis. It is important to note that Arizona has a
12 primary interest in adjudicating this case, because the property and assets in question
13 are not in Nevada, but in Arizona, where they have always been. Even taking the
14 Complaint at face value, Herbst has only alleged that Superpumper's shares were
15 involved in a Nevada transfer. The Company, its employees, assets, customers,
16 vendors, and offices are located in Arizona and always have been. There is nothing
17 about Nevada, or this case, that renders Nevada any more appropriate for resolution
18 than any other jurisdiction. Considering the utter lack of contacts, along with
19 Superpumper's non-involvement in the alleged transfer, forcing Superpumper to defend
20 here is not in keeping with notions of fair play and substantial justice.

21 **III. CONCLUSION**

22 There is no basis for exercise of personal jurisdiction over Superpumper.
23 Superpumper has never had any contact with Nevada. Plaintiff cannot sustain its burden
24 by producing facts showing that Superpumper has ever availed itself of the laws and
25 protections of Nevada, nor that it would be reasonable for Superpumper to be haled into
26 court here. The Motion to Dismiss should be granted, and Superpumper prays the Court
27 do so.

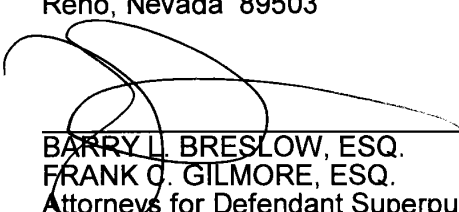
28 **///**

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the
social security number of any person.

DATED this 15th day of July, 2014.

ROBISON, BELAUSTEGUI, SHARP & LOW
A Professional Corporation
71 Washington Street
Reno, Nevada 89503



BARRY L. BRESLOW, ESQ.
FRANK C. GILMORE, ESQ.
Attorneys for Defendant Superpumper, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Robison, Belaustegui, Sharp & Low, and that on this date I caused to be served a true copy of the **DEFENDANT SUPERPUMPER, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION** (NRCP 12(b)(2)) all parties to this action by the method(s) indicated below:

by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

Gerald Gordon, Esq.
John Desmond, Esq.
Brian Irvine, Esq.
Gordon Silver
100 West Liberty Street, Suite 940
Reno, Nevada 89501

by using the Court's CM/ECF Electronic Notification System addressed to:

Gerald Gordon, Esq.
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John Desmond, Esq.
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by personal delivery/hand delivery addressed to:

by facsimile (fax) addressed to:

by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 15th day of July, 2014.



IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

JH, INC., a Nevada corporation; JERRY
HERBST, an individual; and BERRY
HINCKLEY INDUSTRIES, a Nevada
corporation,

Plaintiffs,

Case No. CV13-02663

Dept. No. 1

vs.

PAUL MORABITO, individually and as Trustee
of the ARCADIA LIVING TRUST;
SUPERPUMPER, INC., an Arizona corporation;
EDWARD BAYUK, individually and as Trustee
of the EDWARD WILLIAM BAYUK LIVING
TRUST; SALVATORE MORABITO, an
individual; and SNOWSHOE PETROLEUM,
INC., a New York corporation,

Defendants.

ORDER

On May 12, 2014, Defendant Snowshoe Petroleum, Inc. ("Snowshoe"), by and through
counsel, Barry L. Breslow, Esq., and Frank C. Gilmore, Esq., filed *Defendant Snowshoe Petroleum,
Inc. 's Motion to Dismiss Complaint for Lack of Personal Jurisdiction (NRCP 12(b)(2))*. On May
29, 2014, Plaintiffs JH, Inc. ("JH"), Jerry Herbst ("Mr. Herbst"), and Berry Hinckley Industries
("Berry Hinckley") (collectively, "Plaintiffs"), by and through counsel, Gerald M. Gordon, Esq.,

1 John P. Desmond, Esq., and Brian R. Irvine, Esq., filed an *Opposition to Motion to Dismiss*.¹ On
2 June 6, 2014, Snowshoe replied and submitted the matter for decision.²

3 In 2007, JH and Consolidated Nevada Corporation³ (“CNC”) purchased Berry Hinkley
4 stock under an Amended and Restated Stock Purchase Agreement (“the Purchase Agreement”).
5 (Compl. ¶ 14.) Defendant Paul Morabito (“Mr. Morabito”) personally guaranteed CNC’s
6 obligations under the Purchase Agreement. *Id.* A dispute arose between Plaintiffs, Mr. Morabito,
7 and CNC concerning the Purchase Agreement. (Compl. ¶ 15.) As a result, in December 2007, Mr.
8 Morabito and CNC brought an action against Plaintiffs in the Second Judicial District Court, Case
9 No. CV-02764, which was assigned to the Honorable Brent Adams (“the Department 6 Action”).
10 (Compl. ¶ 16.) In the Department 6 Action, Plaintiffs filed a number of counterclaims against Mr.
11 Morabito and CNC, including fraud, misrepresentation, and breach of contract. (Compl. ¶ 17.) On
12 September 13, 2010, the Court entered oral judgment in favor of Plaintiffs on a number of fraud-
13 based claims, followed by findings of fact and conclusions of law entered a month later. (Compl.
14 ¶¶ 18-19.) On August 23, 2011, the Court entered a judgment awarding Plaintiffs damages in the
15 amount of \$149,444,777.80 (“the Judgment”). (Compl. ¶ 20.)

16 While Mr. Morabito and CNC’s appeal of the Judgment was pending before the Nevada
17 Supreme Court, the parties entered into a Settlement Agreement and Mutual Release (“the
18 Settlement Agreement”) on November 30, 2011. (Compl. ¶ 21.) The Settlement Agreement
19 provided the parties would agree to vacate the appeal, as well as the Judgment, in exchange for
20 executing an \$85 million confession of judgment (“the Confessed Judgment”). *Id.* In the
21 Settlement Agreement, Mr. Morabito and CNC agreed timely pay their financial obligations, and to
22 submit themselves to the jurisdiction of the Second Judicial District Court for any dispute relating
23 to the Settlement Agreement. *Id.* Plaintiffs allege Mr. Morabito and CNC did not intend to comply

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26 omitted from the original filing.

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28 Jurisdiction*, which has not been fully briefed or submitted yet.

³At the time of the Purchase Agreement, CNC’s predecessor-in-interest was “P.A. Morabito & Co.” (Compl. ¶ 9.)

1 with the terms of the Settlement Agreement, and induced Plaintiffs into executing the Settlement
2 Agreement in order to delay and avoid execution and collection of the Judgment so that they would
3 have more time to transfer and dissipate assets. (Compl. ¶ 23.)

4 Shortly after executing the Settlement Agreement, Mr. Morabito and CNC allegedly failed
5 to comply with several of its terms and defaulted. (Compl. ¶ 24.) Following the default, the parties
6 executed a Forbearance Agreement on March 1, 2013. (Compl. ¶¶ 25-26.) The Forbearance
7 Agreement provided that in the event of its default, or of default under the Settlement Agreement
8 (other than the acknowledged continuing defaults), Plaintiffs were entitled to immediately exercise
9 and enforce their rights and remedies under the Settlement Agreement. (Compl. ¶ 29.) Plaintiffs
10 allege Mr. Morabito and CNC did not intend to comply with the terms of the Forbearance
11 Agreement, and induced Plaintiffs into executing the Forbearance Agreement in order to delay and
12 avoid execution and collection of the Judgment so that they would have more time to transfer and
13 dissipate assets. (Compl. ¶ 30.)

14 Plaintiffs allege Mr. Morabito and CNC failed to comply with the terms of the Forbearance
15 Agreement, and on June 18, 2013, Plaintiffs filed the Confessed Judgment with the Second Judicial
16 District Court, resulting in Mr. Morabito and CNC being jointly and severally indebted to Plaintiffs
17 in the amount of \$85 million. (Compl. ¶¶ 31-32.) Plaintiffs allege Defendants engaged in a series
18 of fraudulent transfers to related parties, including Snowshoe, in an effort to prevent collection of
19 the Judgment or Confessed Judgment, and to protect Mr. Morabito from having any of his assets
20 seized. (Compl. ¶ 34.)

21 Plaintiffs have filed six claims against Defendants: (1) for fraudulent transfers under NRS
22 Chapter 112 against all Defendants; (2) for breach of contract against Mr. Morabito; (3) for breach
23 of the implied covenant of good faith and fair dealing against Mr. Morabito; (4) for fraudulent
24 inducement/misrepresentation against Mr. Morabito; (5) for civil conspiracy against all Defendants;
25 and (6) for aiding and abetting fraudulent misrepresentation against Bayuk, Salvatore Morabito,
26 Snowshoe, and Superpumper. (Compl. ¶¶ 36-85.) Plaintiffs request compensatory and punitive
27 damages, reasonable attorney fees and costs, garnishments against Defendants who received the
28 fraudulent assets, avoidance of the transfer of obligation to the extent necessary to satisfy Plaintiffs'

1 claim, and attachment or other provisional remedy against the asset transferred or other property of
2 Defendants.

3 The following alleged facts are relevant to the resolution of this *Motion to Dismiss*: Mr.
4 Morabito was a director and shareholder of Consolidated Western Corporation (“CWC”), a Nevada
5 Corporation. (Opp’n Ex. 3.) Mr. Morabito’s brother, Salvatore Morabito, was vice-president of
6 CWC. *Id.* Mr. Morabito owned 80% of CWC. (Compl. ¶ 35.) Salvatore Morabito owned 10% of
7 CWC, and Edward Bayuk, Mr. Morabito’s domestic partner, also owned 10%.⁴ *Id.*

8 On September 29, 2010, CWC merged into Superpumper, Inc. (“Superpumper”), an Arizona
9 corporation. *Id.* Mr. Morabito also owned 80% of the shares in Superpumper. *Id.* Superpumper’s
10 principal place of business is Maricopa County, Arizona. (Compl. ¶ 6.)

11 The next day, Mr. Morabito sold his 80% interest in Superpumper to Snowshoe for
12 approximately \$2.5 million, despite the fact that the shares had allegedly been valued at more than
13 \$5.5 million in 2009. *Id.* Snowshoe is a New York corporation, and Salvatore Morabito is the chief
14 executive officer; Bayuk is a shareholder and director. (Opp’n Ex. 8.) According to Salvatore
15 Morabito, Snowshoe’s principal office is located in Buffalo, New York, it has never had any
16 contacts with the State of Nevada, and the transfer of Mr. Morabito’s interest in Superpumper to
17 Snowshoe was facilitated in New York, with New York counsel, and under the application of New
18 York law. (Decl. of Salvatore Morabito ¶ 5, ¶ 9, ¶ 12.) However, Plaintiffs contend Snowshoe
19 Petroleum was incorporated the day before the sale for the sole purpose of receiving the transfer
20 from Mr. Morabito. *Id.* Plaintiffs allege this transfer and others were done in an effort to avoid
21 collection on the Judgment and Confession of Judgment. (Compl. ¶ 35.) Plaintiffs aver the Second
22 Judicial District Court has jurisdiction over the matter because Defendants reside or are located in
23 Washoe County, the activities complained of occurred in Washoe County, the alleged fraudulent
24

25
26 ⁴ Mr. Morabito, Salvatore Morabito, and Bayuk all allegedly resided in Nevada at some point, though the exact dates of
their residencies is unclear. (Compl. ¶ 4, ¶ 7, ¶ 9; Opp’n Ex.11, Ex. 13.)

27 Mr. Herbst, who owns JH, is a Nevada resident. (Compl. ¶ 2.) JH is a Nevada corporation with its principal place of
28 business in Washoe County. (Compl. ¶ 1.) JH also owns Berry Hinckley, which is a Nevada corporation with its
principal place of business in Washoe County. (Compl. ¶ 1, ¶ 3.)

1 transfers originated from Washoe County, and/or Defendants expressly agreed to submit themselves
2 to the Second Judicial District Court's jurisdiction. (Compl. ¶ 11.)

3 In its *Motion to Dismiss*, Snowshoe argues the Court lacks personal jurisdiction over it
4 under Nevada's long-arm statute because Plaintiff fails to allege Snowshoe had any contacts with
5 Nevada, and the alleged conspiracy has no connection to Nevada. (Mtn. 2:12-17.) Snowshoe
6 contends it never participated in any transactions that "originated" in Washoe County, and has not
7 had any contact with Nevada that justifies the exercise of personal jurisdiction over it. (Mtn. 2:27-
8 3:1.) Snowshoe avers: (1) it was incorporated by Salvatore Morabito, a dual Canadian/American
9 citizen and current resident of the State of Arizona; (2) its attorneys in Buffalo, New York, prepared
10 the articles and other filings and provided advice to Salvatore Morabito from New York; (3) its
11 principal office is located in Buffalo, New York, and has been since the date of its incorporation;
12 (4) it has never transacted business in Nevada, or sold products, nor offered services in Nevada; and
13 (5) it has not had any employees who worked in Nevada. (Mtn. 3:3-10.) While Snowshoe owns an
14 interest in Defendant Superpumper, Superpumper is an Arizona corporation with no assets or
15 business in Nevada. (Mtn. 3:10-12.)

16 Snowshoe argues that while Mr. Morabito previously owned an interest in Superpumper,
17 that interest was sold to Snowshoe in September 2010, and the transfer of interest was facilitated in
18 New York, with New York counsel, under the application of New York law. (Mtn. 3:13-16.) At
19 the time the transfer occurred, Salvatore Morabito was a resident of the State of California. (Mtn.
20 3:17-18.) Therefore, Snowshoe argues Nevada lacks general jurisdiction over Snowshoe because
21 Plaintiffs have not alleged it has a systematic and continuous presence in the state. (Mtn. 5:11-6:3.)
22 Further, Snowshoe argues Nevada does not have specific jurisdiction over it due to its alleged
23 conspiracy with one-time Nevada residents because a number of courts rejected the theory of
24 conspiracy jurisdiction; even if the Court adopted that theory, a bare allegation of conspiracy
25 between the defendant and a person within the personal jurisdiction of the court is insufficient to
26 establish personal jurisdiction over the defendant. (Mtn. 6:4-7:4.) Further, Snowshoe has not
27 purposely directed any contact towards Nevada. (Mtn. 7:9-8:1.)

28

1 Plaintiffs respond they are asserting that specific, not general, jurisdiction applies in this
2 case, and that Snowshoe was formed with the specific purpose to accept a fraudulent transfer of a
3 significant Nevada asset from a Nevada judgment debtor, without payment of adequate value.
4 (Opp'n 7:15-16.) Plaintiffs argue it is clear these actions were undertaken at Mr. Morabito and his
5 co-conspirators' direction with the intent to stop or hinder Plaintiffs from collecting their Nevada
6 judgment, given then timing and the effort undertaken to move the asset from Nevada to an entity
7 formed in New York, and from Mr. Morabito to related to third parties. (Opp'n 7:16-20.) Plaintiffs
8 note Snowshoe was formed only two weeks after the Honorable Brent Adams orally entered a
9 multi-million dollar judgment against Mr. Morabito, and Snowshow was formed by Mr. Morabito's
10 New York counsel, Dennis Vacco, Esq., who has also represented Bayuk and Salvatore Morabito,
11 and was admitted pro hac vice in the Department 6 Action; Snowshoe was formed at the direction
12 of Mr. Morabito's brother, Salvatore Morabito, who also serves as CEO, and Bayuk, Mr.
13 Morabito's domestic partner, was a shareholder and director of Snowshoe when it was formed and
14 when it purchased Mr. Morabito's interest in Superpumper. (Opp'n 7:21-28.) Further, Mr.
15 Morabito, Bayuk, and Salvatore Morabito all admitted they were residents of Nevada sometime
16 during 2010, and Snowshoe received an asset that had been owned and controlled by Mr.
17 Morabito—over \$5.5 million in shares in CWC, a Nevada corporation—for less than fair market
18 value. (Opp'n 8:1-4.) Plaintiffs aver their claim arises directly out of this action. (Opp'n 8:13-20.)
19 Plaintiffs clarify that a conspiracy theory is not the basis of their assertion of personal jurisdiction;
20 instead, Plaintiffs argue Snowshoe has availed itself to the jurisdiction of Nevada court because it
21 was the ultimate recipient of a Nevada asset from a Nevada judgment creditor, and it knowingly
22 took the asset for less than fair market value. (Opp'n 8:21-25.)

23 Where personal jurisdiction is decided without a full evidentiary hearing, the "plaintiff need
24 only make a *prima facie* showing of jurisdiction." *Firouzabadi v. First Judicial Dist. Court*, 110
25 Nev. 1348, 1352, 885 P.2d 616, 618-19 (1994). "If the plaintiff makes a *prima facie* case of
26 jurisdiction prior to trial, the plaintiff must still prove personal jurisdiction at trial by a
27 preponderance of the evidence." *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 693, 857
28 P.2d 740, 744 (1993). This showing must be made by "introducing competent evidence of essential

1 facts,” which can include affidavits, depositions, and other discovery materials. *Id.* at 692-93, 587
2 P.2d at 743-44. The Court “accepts all properly supported proffers of evidence by the plaintiff as
3 true” and resolves factual disputes in the plaintiff’s favor. *Id.* at 693, 857 P.2d at 744.

4 “To obtain jurisdiction over a non-resident defendant, a plaintiff must show: (1) that the
5 requirements of the state’s long-arm statute have been satisfied, and (2) that due process is not
6 offended by the exercise of jurisdiction.” *Id.* at 687, 698, 857 P.2d at 747; *see also* NRS 14.065(1).
7 Due process requires that “minimum contacts” exist “between the defendant and the forum state
8 ‘such that the maintenance of the suit does not offend traditional notions of fair play and substantial
9 justice. *Consipio Holding, BV v. Carlberg*, 128 Nev. ___, ___, 282 P.3d 751, 754 (2012) (quoting
10 *Trump*, 109 Nev. at 698, 857 P.2d at 747). The defendant should “reasonably anticipate being
11 haled into court” in the forum state due to its conduct and connection there. *Id.* at ___, 282 P.3d at
12 754 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). However,
13 “[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot
14 satisfy the requirement of contact with the forum state.” *MGM Grand, Inc. v. Eighth Judicial Dist.*
15 *Court*, 107 Nev. 65, 69, 807 P.2d 201, 203 (1991).

16 The Court applies a three part-inquiry to determine whether specific personal jurisdiction
17 exists, which consists of: (1) whether the defendant purposely availed itself to the privilege of
18 conducting business in the state, or purposefully directed its actions towards the state, (2) whether
19 the cause of action arises out of the defendant’s forum-related activities, and (3) whether the
20 exercise of jurisdiction over the defendant is reasonable. *See Consipio*, 128 Nev. at ___, 282 P.3d
21 at 755.

22 Pursuant to the Nevada Uniform Fraudulent Transfer Act (“NUFTA”), a creditor may void a
23 transfer against the initial transferee of the asset, or any subsequent transferee that did not take in
24 good faith for value. NRS 112.220(2). Relief under NUFTA requires proof that the debtor made
25 the alleged fraudulent transfer with (a) “actual intent to hinder, delay or defraud any creditor,” or
26 (b) the debtor, who was insolvent at the time or became so as a result of the transfer, did not receive
27 “reasonably equivalent value in exchange.” NRS 112.180(1); NRS 112.190. In determining actual
28 intent, NRS 112.180(2) lists eleven “badges of fraud” that may be considered, among other factors.

1 *See In re Nat'l Audit Defense Network*, 367 B.R. 207, 219-20 (Bank. D. Nev. 2007) ("Intent
2 required for actual fraudulent transfers is established by circumstantial evidence . . . courts have
3 developed 'badges of fraud'—that is, recurring actions that historically have been associated with
4 actual intent to hinder, delay or defraud creditors."). A judgment may be entered against the first
5 transferee of the asset, or "[a]ny subsequent transferee other than a transferee who took in good
6 faith for value or from any subsequent transferee." NRS 112.220(2)(b). Other relief may include
7 "[a]n injunction against further disposition by the debtor or transferee, or both, of the asset
8 transferred or of other property." NRS 112.210(1)(c)(1).

9 Acceptance of an alleged fraudulent transfer of Nevada assets may sustain a prima facie
10 showing of specific personal jurisdiction. *See Casentini v. Ninth Judicial Dist. Court*, 110 Nev.
11 721, 727, 887 P.2d 535, 539-40 (1994) (finding personal jurisdiction over a California resident who
12 was the primary or sole shareholder of a Nevada corporation, declared a Nevada address on the
13 corporate income tax form as his address, and engaged in allegedly fraudulent stock transfers
14 involving the Nevada corporation with his son, who was a Nevada resident). Further, intentional
15 conduct occurring outside the forum state, but designed to cause harm in the forum state, may be a
16 basis for finding minimum contacts. *Calder v. Jones*, 465 U.S. 783, 787-90 (1984) (holding that
17 defendants must "reasonably anticipated being haled into court [in the forum state]" because "their
18 intentional, and allegedly tortious, actions were expressly aimed at" the forum state, even though
19 they occurred outside the forum state, and "they knew that the brunt of th[e] injury would be felt" in
20 the forum state.").

21 Here, resolving factual disputes in the Plaintiffs' favor, the former Nevada assets, Mr.
22 Morabito's shares of CWC, are held by Snowshoe, an out-of-state corporation owned and operated
23 by sophisticated businessmen and purported Nevada residents as the result of alleged fraudulent
24 transfers between corporations owned and operated by those same businessmen. These transfers
25 were allegedly a means of shielding the former Nevada assets from execution to satisfy a judgment
26 from a Nevada court. The Court must give deference to Plaintiffs' allegations. Plaintiffs allege
27 Snowshoe knew it was engaging in business transactions for the purpose of defrauding Nevada
28 residents of a judgment won in a Nevada state court; these allegations of Defendants' knowledge

1 and actual involvement in the alleged fraudulent business transactions support a finding that
2 Snowshoe purposefully availed itself to Nevada jurisdiction. Snowshoe's contacts with Nevada
3 were not the result of a unilateral act of a third party, nor were they random or fortuitous; they are
4 allegedly the direct and intended consequence of the transfers in September 2010. Therefore, the
5 Court finds Snowshoe purposefully availed itself to the conduct of business in Nevada, and/or
6 purposefully directed its actions towards Nevada, and Plaintiffs' alleged injury arises out of this
7 alleged conduct.

8 The Court finds Defendants have failed to present a compelling case that exercise of
9 personal jurisdiction would be unreasonable under the global circumstances of this case. *See*
10 *Trump*, 109 Nev. at 700, 857 P.2d at 749-50 (noting that even when a defendant has sufficient
11 contacts with the forum state to establish specific jurisdiction, the defendant may still defeat
12 jurisdiction by making a compelling case that other factors render the exercise of jurisdiction
13 unreasonable).

14 The Court has considered the arguments of the parties and the record in its entirety.
15 Accordingly, and good cause appearing, Snowshoe Petroleum, Inc.'s *Motion to Dismiss Complaint*
16 *for Lack of Personal Jurisdiction (NRCP 12(b)(2))* is DENIED.

17 IT IS SO ORDERED.

18 DATED this 17th day of July, 2014.

19
20
21 
22 JANET J. BERRY
23 District Judge
24
25
26
27
28

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 17th day of July, 2014, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Gerald M. Gordon, Esq.
John P. Desmond, Esq.
Brian R. Irvine, Esq.
Barry L. Breslow, Esq.
Frank C. Gilmore, Esq.


Christine Kuhl

1 **2540**
2 GORDON SILVER
3 GERALD M. GORDON, ESQ.
4 Nevada Bar No. 229
5 Email: ggordon@gordonsilver.com
6 JOHN P. DESMOND
7 Nevada Bar No. 5618
8 Email: jdesmond@gordonsilver.com
9 BRIAN R. IRVINE
10 Nevada Bar No. 7758
11 Email: birvine@gordonsilver.com
12 100 West Liberty Street
13 Suite 940
14 Reno, Nevada 89501
15 Tel: (775) 343-7500
16 Fax: (775) 786-0131

17 *Attorneys for Plaintiffs*

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York corporation,

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 6

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order denying Defendant Snowshoe Petroleum, Inc.'s
Motion to Dismiss Complaint for Lack of Personal Jurisdiction, was entered on the 17th day of

1 July, 2014, in the above-captioned matter. A copy of the written order is attached hereto as
2 "Exhibit 1".

3 **AFFIRMATION**

4 **Pursuant to NRS 239B.030**

5 The undersigned does hereby affirm that the preceding document does not contain the
6 social security number of any person.

7 DATED this 17th day of July, 2014.

8 GORDON SILVER

9
10 By: /s/ Brian R. Irvine
11 GERALD M. GORDON, ESQ.
12 Nevada Bar No. 229
13 Email: ggordon@gordonsilver.com
14 JOHN P. DESMOND
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21 Suite 940
22 Reno, Nevada 89501
23 Tel: (775) 343-7500
24 Fax: (775) 786-0131

25 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF ORDER** on the parties as set forth below:

☒ XXX Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices

☐ Certified Mail, Return Receipt Requested

☐ Via Facsimile (Fax)

☐ Via E-Mail

☐ Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered

☐ Federal Express (or other overnight delivery)

addressed as follows:

Barry Breslow
Frank Gilmore
ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, NV 89503

DATED this 17th day of July, 2014.

/s/ Cindy S. Grinstead
An Employee of GORDON SILVER

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EXHIBIT TABLE

Exhibit	Description	Pages ¹
1	Order, July 17, 2014	10

¹ Exhibit page counts are exclusive of exhibit slip sheets.

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13 dissipate assets. (Compl. ¶ 30.)

14 Plaintiffs allege Mr. Morabito and CNC failed to comply with the terms of the Forbearance
15 Agreement, and on June 18, 2013, Plaintiffs filed the Confessed Judgment with the Second Judicial
16 District Court, resulting in Mr. Morabito and CNC being jointly and severally indebted to Plaintiffs
17 in the amount of \$85 million. (Compl. ¶¶ 31-32.) Plaintiffs allege Defendants engaged in a series
18 of fraudulent transfers to related parties, including Snowshoe, in an effort to prevent collection of
19 the Judgment or Confessed Judgment, and to protect Mr. Morabito from having any of his assets
20 seized. (Compl. ¶ 34.)

21 Plaintiffs have filed six claims against Defendants: (1) for fraudulent transfers under NRS
22 Chapter 112 against all Defendants; (2) for breach of contract against Mr. Morabito; (3) for breach
23 of the implied covenant of good faith and fair dealing against Mr. Morabito; (4) for fraudulent
24 inducement/misrepresentation against Mr. Morabito; (5) for civil conspiracy against all Defendants;
25 and (6) for aiding and abetting fraudulent misrepresentation against Bayuk, Salvatore Morabito,
26 Snowshoe, and Superpumper. (Compl. ¶¶ 36-85.) Plaintiffs request compensatory and punitive
27 damages, reasonable attorney fees and costs, garnishments against Defendants who received the
28 fraudulent assets, avoidance of the transfer of obligation to the extent necessary to satisfy Plaintiffs'

1 claim, and attachment or other provisional remedy against the asset transferred or other property of
2 Defendants.

3 The following alleged facts are relevant to the resolution of this *Motion to Dismiss*: Mr.
4 Morabito was a director and shareholder of Consolidated Western Corporation ("CWC"), a Nevada
5 Corporation. (Opp'n Ex. 3.) Mr. Morabito's brother, Salvatore Morabito, was vice-president of
6 CWC. *Id.* Mr. Morabito owned 80% of CWC. (Compl. ¶ 35.) Salvatore Morabito owned 10% of
7 CWC, and Edward Bayuk, Mr. Morabito's domestic partner, also owned 10%.⁴ *Id.*

8 On September 29, 2010, CWC merged into Superpumper, Inc. ("Superpumper"), an Arizona
9 corporation. *Id.* Mr. Morabito also owned 80% of the shares in Superpumper. *Id.* Superpumper's
10 principal place of business is Maricopa County, Arizona. (Compl. ¶ 6.)

11 The next day, Mr. Morabito sold his 80% interest in Superpumper to Snowshoe for
12 approximately \$2.5 million, despite the fact that the shares had allegedly been valued at more than
13 \$5.5 million in 2009. *Id.* Snowshoe is a New York corporation, and Salvatore Morabito is the chief
14 executive officer; Bayuk is a shareholder and director. (Opp'n Ex. 8.) According to Salvatore
15 Morabito, Snowshoe's principal office is located in Buffalo, New York, it has never had any
16 contacts with the State of Nevada, and the transfer of Mr. Morabito's interest in Superpumper to
17 Snowshoe was facilitated in New York, with New York counsel, and under the application of New
18 York law. (Decl. of Salvatore Morabito ¶ 5, ¶ 9, ¶ 12.) However, Plaintiffs contend Snowshoe
19 Petroleum was incorporated the day before the sale for the sole purpose of receiving the transfer
20 from Mr. Morabito. *Id.* Plaintiffs allege this transfer and others were done in an effort to avoid
21 collection on the Judgment and Confession of Judgment. (Compl. ¶ 35.) Plaintiffs aver the Second
22 Judicial District Court has jurisdiction over the matter because Defendants reside or are located in
23 Washoe County, the activities complained of occurred in Washoe County, the alleged fraudulent

25
26 ⁴ Mr. Morabito, Salvatore Morabito, and Bayuk all allegedly resided in Nevada at some point, though the exact dates of
their residencies is unclear. (Compl. ¶ 4, ¶ 7, ¶ 9; Opp'n Ex.11, Ex. 13.)

27 Mr. Herbst, who owns JH, is a Nevada resident. (Compl. ¶ 2.) JH is a Nevada corporation with its principal place of
28 business in Washoe County. (Compl. ¶ 1.) JH also owns Berry Hinckley, which is a Nevada corporation with its
principal place of business in Washoe County. (Compl. ¶ 1, ¶ 3.)

1 transfers originated from Washoe County, and/or Defendants expressly agreed to submit themselves
2 to the Second Judicial District Court's jurisdiction. (Compl. ¶ 11.)

3 In its *Motion to Dismiss*, Snowshoe argues the Court lacks personal jurisdiction over it
4 under Nevada's long-arm statute because Plaintiff fails to allege Snowshoe had any contacts with
5 Nevada, and the alleged conspiracy has no connection to Nevada. (Mtn. 2:12-17.) Snowshoe
6 contends it never participated in any transactions that "originated" in Washoe County, and has not
7 had any contact with Nevada that justifies the exercise of personal jurisdiction over it. (Mtn. 2:27-
8 3:1.) Snowshoe avers: (1) it was incorporated by Salvatore Morabito, a dual Canadian/American
9 citizen and current resident of the State of Arizona; (2) its attorneys in Buffalo, New York, prepared
10 the articles and other filings and provided advice to Salvatore Morabito from New York; (3) its
11 principal office is located in Buffalo, New York, and has been since the date of its incorporation;
12 (4) it has never transacted business in Nevada, or sold products, nor offered services in Nevada; and
13 (5) it has not had any employees who worked in Nevada. (Mtn. 3:3-10.) While Snowshoe owns an
14 interest in Defendant Superpumper, Superpumper is an Arizona corporation with no assets or
15 business in Nevada. (Mtn. 3:10-12.)

16 Snowshoe argues that while Mr. Morabito previously owned an interest in Superpumper,
17 that interest was sold to Snowshoe in September 2010, and the transfer of interest was facilitated in
18 New York, with New York counsel, under the application of New York law. (Mtn. 3:13-16.) At
19 the time the transfer occurred, Salvatore Morabito was a resident of the State of California. (Mtn.
20 3:17-18.) Therefore, Snowshoe argues Nevada lacks general jurisdiction over Snowshoe because
21 Plaintiffs have not alleged it has a systematic and continuous presence in the state. (Mtn. 5:11-6:3.)
22 Further, Snowshoe argues Nevada does not have specific jurisdiction over it due to its alleged
23 conspiracy with one-time Nevada residents because a number of courts rejected the theory of
24 conspiracy jurisdiction; even if the Court adopted that theory, a bare allegation of conspiracy
25 between the defendant and a person within the personal jurisdiction of the court is insufficient to
26 establish personal jurisdiction over the defendant. (Mtn. 6:4-7:4.) Further, Snowshoe has not
27 purposely directed any contact towards Nevada. (Mtn. 7:9-8:1.)

28

1 Plaintiffs respond they are asserting that specific, not general, jurisdiction applies in this
2 case, and that Snowshoe was formed with the specific purpose to accept a fraudulent transfer of a
3 significant Nevada asset from a Nevada judgment debtor, without payment of adequate value.
4 (Opp'n 7:15-16.) Plaintiffs argue it is clear these actions were undertaken at Mr. Morabito and his
5 co-conspirators' direction with the intent to stop or hinder Plaintiffs from collecting their Nevada
6 judgment, given then timing and the effort undertaken to move the asset from Nevada to an entity
7 formed in New York, and from Mr. Morabito to related to third parties. (Opp'n 7:16-20.) Plaintiffs
8 note Snowshoe was formed only two weeks after the Honorable Brent Adams orally entered a
9 multi-million dollar judgment against Mr. Morabito, and Snowshow was formed by Mr. Morabito's
10 New York counsel, Dennis Vacco, Esq., who has also represented Bayuk and Salvatore Morabito,
11 and was admitted pro hac vice in the Department 6 Action; Snowshoe was formed at the direction
12 of Mr. Morabito's brother, Salvatore Morabito, who also serves as CEO, and Bayuk, Mr.
13 Morabito's domestic partner, was a shareholder and director of Snowshoe when it was formed and
14 when it purchased Mr. Morabito's interest in Superpumper. (Opp'n 7:21-28.) Further, Mr.
15 Morabito, Bayuk, and Salvatore Morabito all admitted they were residents of Nevada sometime
16 during 2010, and Snowshoe received an asset that had been owned and controlled by Mr.
17 Morabito—over \$5.5 million in shares in CWC, a Nevada corporation—for less than fair market
18 value. (Opp'n 8:1-4.) Plaintiffs aver their claim arises directly out of this action. (Opp'n 8:13-20.)
19 Plaintiffs clarify that a conspiracy theory is not the basis of their assertion of personal jurisdiction;
20 instead, Plaintiffs argue Snowshoe has availed itself to the jurisdiction of Nevada court because it
21 was the ultimate recipient of a Nevada asset from a Nevada judgment creditor, and it knowingly
22 took the asset for less than fair market value. (Opp'n 8:21-25.)

23 Where personal jurisdiction is decided without a full evidentiary hearing, the "plaintiff need
24 only make a *prima facie* showing of jurisdiction." *Firouzabadi v. First Judicial Dist. Court*, 110
25 Nev. 1348, 1352, 885 P.2d 616, 618-19 (1994). "If the plaintiff makes a *prima facie* case of
26 jurisdiction prior to trial, the plaintiff must still prove personal jurisdiction at trial by a
27 preponderance of the evidence." *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 693, 857
28 P.2d 740, 744 (1993). This showing must be made by "introducing competent evidence of essential

1 facts,” which can include affidavits, depositions, and other discovery materials. *Id.* at 692-93, 587
2 P.2d at 743-44. The Court “accepts all properly supported proffers of evidence by the plaintiff as
3 true” and resolves factual disputes in the plaintiff’s favor. *Id.* at 693, 857 P.2d at 744.

4 “To obtain jurisdiction over a non-resident defendant, a plaintiff must show: (1) that the
5 requirements of the state’s long-arm statute have been satisfied, and (2) that due process is not
6 offended by the exercise of jurisdiction.” *Id.* at 687, 698, 857 P.2d at 747; *see also* NRS 14.065(1).
7 Due process requires that “minimum contacts” exist “between the defendant and the forum state
8 ‘such that the maintenance of the suit does not offend traditional notions of fair play and substantial
9 justice. *Consipio Holding, BV v. Carlberg*, 128 Nev. ___, ___, 282 P.3d 751, 754 (2012) (quoting
10 *Trump*, 109 Nev. at 698, 857 P.2d at 747). The defendant should “reasonably anticipate being
11 haled into court” in the forum state due to its conduct and connection there. *Id.* at ___, 282 P.3d at
12 754 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). However,
13 “[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot
14 satisfy the requirement of contact with the forum state.” *MGM Grand, Inc. v. Eighth Judicial Dist.*
15 *Court*, 107 Nev. 65, 69, 807 P.2d 201, 203 (1991).

16 The Court applies a three part-inquiry to determine whether specific personal jurisdiction
17 exists, which consists of: (1) whether the defendant purposely availed itself to the privilege of
18 conducting business in the state, or purposefully directed its actions towards the state, (2) whether
19 the cause of action arises out of the defendant’s forum-related activities, and (3) whether the
20 exercise of jurisdiction over the defendant is reasonable. *See Consipio*, 128 Nev. at ___, 282 P.3d
21 at 755.

22 Pursuant to the Nevada Uniform Fraudulent Transfer Act (“NUFTA”), a creditor may void a
23 transfer against the initial transferee of the asset, or any subsequent transferee that did not take in
24 good faith for value. NRS 112.220(2). Relief under NUFTA requires proof that the debtor made
25 the alleged fraudulent transfer with (a) “actual intent to hinder, delay or defraud any creditor,” or
26 (b) the debtor, who was insolvent at the time or became so as a result of the transfer, did not receive
27 “reasonably equivalent value in exchange.” NRS 112.180(1); NRS 112.190. In determining actual
28 intent, NRS 112.180(2) lists eleven “badges of fraud” that may be considered, among other factors.

1 *See In re Nat'l Audit Defense Network*, 367 B.R. 207, 219-20 (Bank. D. Nev. 2007) ("Intent
2 required for actual fraudulent transfers is established by circumstantial evidence . . . courts have
3 developed 'badges of fraud'—that is, recurring actions that historically have been associated with
4 actual intent to hinder, delay or defraud creditors."). A judgment may be entered against the first
5 transferee of the asset, or "[a]ny subsequent transferee other than a transferee who took in good
6 faith for value or from any subsequent transferee." NRS 112.220(2)(b). Other relief may include
7 "[a]n injunction against further disposition by the debtor or transferee, or both, of the asset
8 transferred or of other property." NRS 112.210(1)(c)(1).

9 Acceptance of an alleged fraudulent transfer of Nevada assets may sustain a prima facie
10 showing of specific personal jurisdiction. *See Casentini v. Ninth Judicial Dist. Court*, 110 Nev.
11 721, 727, 887 P.2d 535, 539-40 (1994) (finding personal jurisdiction over a California resident who
12 was the primary or sole shareholder of a Nevada corporation, declared a Nevada address on the
13 corporate income tax form as his address, and engaged in allegedly fraudulent stock transfers
14 involving the Nevada corporation with his son, who was a Nevada resident). Further, intentional
15 conduct occurring outside the forum state, but designed to cause harm in the forum state, may be a
16 basis for finding minimum contacts. *Calder v. Jones*, 465 U.S. 783, 787-90 (1984) (holding that
17 defendants must "reasonably anticipated being haled into court [in the forum state]" because "their
18 intentional, and allegedly tortious, actions were expressly aimed at" the forum state, even though
19 they occurred outside the forum state, and "they knew that the brunt of th[e] injury would be felt" in
20 the forum state.").

21 Here, resolving factual disputes in the Plaintiffs' favor, the former Nevada assets, Mr.
22 Morabito's shares of CWC, are held by Snowshoe, an out-of-state corporation owned and operated
23 by sophisticated businessmen and purported Nevada residents as the result of alleged fraudulent
24 transfers between corporations owned and operated by those same businessmen. These transfers
25 were allegedly a means of shielding the former Nevada assets from execution to satisfy a judgment
26 from a Nevada court. The Court must give deference to Plaintiffs' allegations. Plaintiffs allege
27 Snowshoe knew it was engaging in business transactions for the purpose of defrauding Nevada
28 residents of a judgment won in a Nevada state court; these allegations of Defendants' knowledge


1 and actual involvement in the alleged fraudulent business transactions support a finding that
2 Snowshoe purposefully availed itself to Nevada jurisdiction. Snowshoe's contacts with Nevada
3 were not the result of a unilateral act of a third party, nor were they random or fortuitous; they are
4 allegedly the direct and intended consequence of the transfers in September 2010. Therefore, the
5 Court finds Snowshoe purposefully availed itself to the conduct of business in Nevada, and/or
6 purposefully directed its actions towards Nevada, and Plaintiffs' alleged injury arises out of this
7 alleged conduct.

8 The Court finds Defendants have failed to present a compelling case that exercise of
9 personal jurisdiction would be unreasonable under the global circumstances of this case. *See*
10 *Trump*, 109 Nev. at 700, 857 P.2d at 749-50 (noting that even when a defendant has sufficient
11 contacts with the forum state to establish specific jurisdiction, the defendant may still defeat
12 jurisdiction by making a compelling case that other factors render the exercise of jurisdiction
13 unreasonable).

14 The Court has considered the arguments of the parties and the record in its entirety.
15 Accordingly, and good cause appearing, Snowshoe Petroleum, Inc.'s *Motion to Dismiss Complaint*
16 *for Lack of Personal Jurisdiction (NRCP 12(b)(2))* is DENIED.

17 IT IS SO ORDERED.

18 DATED this 17th day of July, 2014.

19
20 
21 JANET J. BERRY
22 District Judge
23
24
25
26
27
28

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 17th day of July, 2014, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Gerald M. Gordon, Esq.
John P. Desmond, Esq.
Brian R. Irvine, Esq.
Barry L. Breslow, Esq.
Frank C. Gilmore, Esq.


Christine Kuhl

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

JH, INC., a Nevada corporation; JERRY
HERBST, an individual; and BERRY
HINCKLEY INDUSTRIES, a Nevada
corporation,

Plaintiffs,

Case No. CV13-02663

Dept. No. 1

vs.

PAUL MORABITO, individually and as Trustee
of the ARCADIA LIVING TRUST;
SUPERPUMPER, INC., an Arizona corporation;
EDWARD BAYUK, individually and as Trustee
of the EDWARD WILLIAM BAYUK LIVING
TRUST; SALVATORE MORABITO, an
individual; and SNOWSHOE PETROLEUM,
INC., a New York corporation,

Defendants.

ORDER

On June 19, 2014, Defendant Superpumper, Inc. ("Superpumper"), by and through counsel, Barry L. Breslow, Esq., and Frank C. Gilmore, Esq., filed *Defendant Superpumper Inc. 's Motion to Dismiss Complaint for Lack of Personal Jurisdiction (NRCP 12(b)(2))*. On July 7, 2014, Plaintiffs JH, Inc. ("JH"), Jerry Herbst ("Mr. Herbst"), and Berry Hinckley Industries ("Berry Hinckley") (collectively, "Plaintiffs"), by and through counsel, Gerald M. Gordon, Esq., John P. Desmond,

1 Esq., and Brian R. Irvine, Esq., filed an *Opposition to Motion to Dismiss*. On July 15, 2014,
2 Superpumper replied and submitted the matter for decision.¹

3 In 2007, JH and Consolidated Nevada Corporation² (“CNC”) purchased Berry Hinkley
4 stock under an Amended and Restated Stock Purchase Agreement (“the Purchase Agreement”).
5 (Compl. ¶ 14.) Defendant Paul Morabito (“Mr. Morabito”) personally guaranteed CNC’s
6 obligations under the Purchase Agreement. *Id.* A dispute arose between Plaintiffs, Mr. Morabito,
7 and CNC concerning the Purchase Agreement. (Compl. ¶ 15.) As a result, in December 2007, Mr.
8 Morabito and CNC brought an action against Plaintiffs in the Second Judicial District Court, Case
9 No. CV-02764, which was assigned to the Honorable Brent Adams (“the Department 6 Action”).
10 (Compl. ¶ 16.) In the Department 6 Action, Plaintiffs filed a number of counterclaims against Mr.
11 Morabito and CNC, including fraud, misrepresentation, and breach of contract. (Compl. ¶ 17.) On
12 September 13, 2010, the Court entered oral judgment in favor of Plaintiffs on a number of fraud-
13 based claims, followed by findings of fact and conclusions of law entered a month later. (Compl.
14 ¶¶ 18-19.) On August 23, 2011, the Court entered a judgment awarding Plaintiffs damages in the
15 amount of \$149,444,777.80 (“the Judgment”). (Compl. ¶ 20.)

16 While Mr. Morabito and CNC’s appeal of the Judgment was pending before the Nevada
17 Supreme Court, the parties entered into a Settlement Agreement and Mutual Release (“the
18 Settlement Agreement”) on November 30, 2011. (Compl. ¶ 21.) The Settlement Agreement
19 provided the parties would agree to vacate the appeal, as well as the Judgment, in exchange for
20 executing an \$85 million confession of judgment (“the Confessed Judgment”). *Id.* In the
21 Settlement Agreement, Mr. Morabito and CNC agreed timely pay their financial obligations, and to
22 submit themselves to the jurisdiction of the Second Judicial District Court for any dispute relating
23 to the Settlement Agreement. *Id.* Plaintiffs allege Mr. Morabito and CNC did not intend to comply
24 with the terms of the Settlement Agreement, and induced Plaintiffs into executing the Settlement
25

26 ¹ On July 17, 2014, the Court entered an *Order denying Defendant Snowshoe Petroleum, Inc.’s Motion to Dismiss*
27 *Complaint for Lack of Personal Jurisdiction (NRCF 12(b)(2))*.

28 ²At the time of the Purchase Agreement, CNC’s predecessor-in-interest was “P.A. Morabito & Co.” (Compl. ¶ 9.)

1 Agreement in order to delay and avoid execution and collection of the Judgment so that they would
2 have more time to transfer and dissipate assets. (Compl. ¶ 23.)

3 Shortly after executing the Settlement Agreement, Mr. Morabito and CNC allegedly failed
4 to comply with several of its terms and defaulted. (Compl. ¶ 24.) Following the default, the parties
5 executed a Forbearance Agreement on March 1, 2013. (Compl. ¶¶ 25-26.) The Forbearance
6 Agreement provided that in the event of its default, or of default under the Settlement Agreement
7 (other than the acknowledged continuing defaults), Plaintiffs were entitled to immediately exercise
8 and enforce their rights and remedies under the Settlement Agreement. (Compl. ¶ 29.) Plaintiffs
9 allege Mr. Morabito and CNC did not intend to comply with the terms of the Forbearance
10 Agreement, and induced Plaintiffs into executing the Forbearance Agreement in order to delay and
11 avoid execution and collection of the Judgment so that they would have more time to transfer and
12 dissipate assets. (Compl. ¶ 30.)

13 Plaintiffs allege Mr. Morabito and CNC failed to comply with the terms of the Forbearance
14 Agreement, and on June 18, 2013, Plaintiffs filed the Confessed Judgment with the Second Judicial
15 District Court, resulting in Mr. Morabito and CNC being jointly and severally indebted to Plaintiffs
16 in the amount of \$85 million. (Compl. ¶¶ 31-32.) Plaintiffs allege Defendants engaged in a series
17 of fraudulent transfers to related parties, including Superpumper, in an effort to prevent collection
18 of the Judgment or Confessed Judgment, and to protect Mr. Morabito from having any of his assets
19 seized. (Compl. ¶ 34.)

20 Plaintiffs have filed six claims against Defendants: (1) for fraudulent transfers under NRS
21 Chapter 112 against all Defendants; (2) for breach of contract against Mr. Morabito; (3) for breach
22 of the implied covenant of good faith and fair dealing against Mr. Morabito; (4) for fraudulent
23 inducement/misrepresentation against Mr. Morabito; (5) for civil conspiracy against all Defendants;
24 and (6) for aiding and abetting fraudulent misrepresentation against Bayuk, Salvatore Morabito,
25 Snowshoe Petroleum, Inc. (“Snowshoe”), and Superpumper. (Compl. ¶¶ 36-85.) Plaintiffs request
26 compensatory and punitive damages, reasonable attorney fees and costs, garnishments against
27 Defendants who received the fraudulent assets, avoidance of the transfer of obligation to the extent
28

1 necessary to satisfy Plaintiffs' claim, and attachment or other provisional remedy against the asset
2 transferred or other property of Defendants.

3 The following alleged facts are relevant to the resolution of this *Motion to Dismiss*: Mr.
4 Morabito was a director and shareholder of Consolidated Western Corporation ("CWC"), a Nevada
5 Corporation. (Opp'n Ex. 3.) Mr. Morabito's brother, Salvatore Morabito, was vice-president of
6 CWC. *Id.* Mr. Morabito owned 80% of CWC. (Compl. ¶ 35.) Salvatore Morabito owned 10% of
7 CWC, and Edward Bayuk, Mr. Morabito's domestic partner, also owned 10%.³ *Id.*

8 On September 29, 2010, CWC merged into Superpumper, an Arizona corporation. *Id.*
9 CWC was previously Superpumper's parent corporation. (Opp'n Ex. 5-8.) Mr. Morabito also
10 owned 80% of the shares in Superpumper. *Id.* Superpumper's principal place of business is
11 Maricopa County, Arizona, and it owns a number of gas stations and convenience stores throughout
12 Arizona. (Compl. ¶ 6; Mtn. Ex. 1, ¶ 6.) Superpumper was incorporated in 1982, and its
13 shareholders are Salvatore Morabito and Bayuk. (Mtn. Ex. 1, ¶ 2-3.)

14 The next day, Mr. Morabito sold his 80% interest in Superpumper to Snowshoe for
15 approximately \$2.5 million, despite the fact that the shares had allegedly been valued at more than
16 \$5.5 million in 2009. *Id.* Plaintiffs allege this transfer and others were done in an effort to avoid
17 collection on the Judgment and Confession of Judgment. (Compl. ¶ 35.) Plaintiffs aver the Second
18 Judicial District Court has jurisdiction over the matter because Defendants reside or are located in
19 Washoe County, the activities complained of occurred in Washoe County, the alleged fraudulent
20 transfers originated from Washoe County, and/or Defendants expressly agreed to submit themselves
21 to the Second Judicial District Court's jurisdiction. (Compl. ¶ 11.)

22 In its *Motion to Dismiss*, Superpumper argues the Court lacks personal jurisdiction over it
23 under Nevada's long-arm statute because Plaintiff fails to allege Superpumper had any contacts
24 with Nevada, aside from formerly being held by its parent company, CWC. (Mtn. 2:13-21.)

25
26 ³ Mr. Morabito, Salvatore Morabito, and Bayuk all allegedly resided in Nevada at some point, though the exact dates of
their residencies is unclear. (Compl. ¶ 4, ¶ 7, ¶ 9; Opp'n Ex.11, Ex. 13.)

27 Mr. Herbst, who owns JH, is a Nevada resident. (Compl. ¶ 2.) JH is a Nevada corporation with its principal place of
28 business in Washoe County. (Compl. ¶ 1.) JH also owns Berry Hinckley, which is a Nevada corporation with its
principal place of business in Washoe County. (Compl. ¶ 1, ¶ 3.)

1 Superpumper contends it never participated in any transactions that “originated” in Washoe County,
2 the merger of CWC into Superpumper did not involve the transfer of any assets, and therefore has
3 not had any contact with Nevada that justifies the exercise of personal jurisdiction. (Mtn. 3:9-24.)

4 Superpumper argues Nevada lacks general jurisdiction over it because Plaintiffs have not
5 alleged it has a systematic and continuous presence in the state. (Mtn. 5:27-6:19.) Further,
6 Superpumper argues Nevada does not have specific jurisdiction over it due to its alleged conspiracy
7 with one-time Nevada residents because a number of courts rejected the theory of conspiracy
8 jurisdiction; even if the Court adopted that theory, a bare allegation of conspiracy between the
9 defendant and a person within the personal jurisdiction of the court is insufficient to establish
10 personal jurisdiction over the defendant. (Mtn. 6:22-8:5.) Further, Superpumper has not purposely
11 directed any contact towards Nevada, as it was formed in the early 1980s and has never availed
12 itself to the privileges of doing business in Nevada. (Mtn. 8:8-8:16.) Superpumper alleges the
13 purported transfer only “regarded” Superpumper shares, but did not “include or involve
14 Superpumper in any meaningful way.” (Mtn. 8:17-19.) Superpumper alleges that it was the asset
15 transferred during the CWC merger, rather than the beneficiary of any purported transfer. (Mtn.
16 8:24-25.)

17 Plaintiffs allege that during Mr. Morabito’s ownership of Berry Hinckley, Mr. Morabito
18 transferred Berry Hinckley assets to related entities; specifically, in 2006, Mr. Morabito allegedly
19 transferred nearly \$4 million from Berry Hinckley to Superpumper. (Opp’n 2:20-22, Ex. 3.)
20 Plaintiffs further allege Mr. Morabito and CNC used Berry Hinckley assets for the benefit of Mr.
21 Morabito’s other entities, including Superpumper. (Opp’n 2:22-28.) Plaintiffs cite to three
22 instances where Mr. Morabito and CNC paid Superpumper’s legal fees in the amount of nearly
23 \$150,000 with Berry Hinckley assets. (Opp’n 3:1-10, Ex. 4.) Further, Plaintiffs contend the merger
24 of CWC into Superpumper occurred after the oral decision in the Department 6 Action, and
25 effectively took at least \$.5 million owned by a Nevada judgment debtor out of Nevada and placed
26 it into an Arizona company. (Opp’n 4:6-23.) The subsequent transfer of Superpumper assets to
27 Snowshoe demonstrates further attempts to evade the Nevada judgment. (Opp’n 4:24-5:2.)
28

1 Plaintiffs also respond they are asserting that specific, not general, jurisdiction applies in
2 this case. (Opp'n 5:16-20.) Plaintiffs contend they have presented the Court with evidence outside
3 the allegations in the Complaint that make a prima facie case for personal jurisdiction, as they have
4 demonstrated Superpumper performed acts that resulted in purposeful availment to the Court's
5 jurisdiction, and their claims against Superpumper arise directly out of Superpumper's Nevada-
6 related activities. (Opp'n 6:22-25.) Superpumper routinely received funds from Berry Hinckley
7 (nearly \$4 million in 2006), Berry Hinckley paid Superpumper's legal fees, and the underlying
8 judgment in this case relates to Mr. Morabito's sale of Berry Hinckley to Plaintiffs. (Opp'n 7:6-
9 11.) Plaintiffs argue the CWC merger into Superpumper was undertaken at Mr. Morabito and his
10 co-conspirators' direction with the intent to stop or hinder Plaintiffs from collecting their Nevada
11 judgment, given then timing and the effort undertaken to move the asset from Nevada to an entity
12 formed in Arizona, and later sell the interest to a New York company, and from Mr. Morabito to
13 related to third parties. (Opp'n 7:12-18.) Plaintiffs allege these facts, taken together, demonstrate
14 Superpumper purposefully availed itself to jurisdiction by (1) accepting funds from Berry Hinckley,
15 a Nevada company, without providing any value to Berry Hinckley prior to the sale of Berry
16 Hinckley to JH; (2) by accepting and participating in, post-judgment, the merger of CWC and
17 knowingly receiving the fraudulent transfer of this Nevada asset. (Opp'n 8:1-7) Plaintiffs clarify
18 that a conspiracy theory is not the basis of their assertion of personal jurisdiction; instead, Plaintiffs
19 argue Superpumper has availed itself to the jurisdiction of Nevada court because it was the recipient
20 of a Nevada asset from a Nevada judgment creditor, and it knowingly took the asset through merger
21 to facilitate the fraudulent transfer to Snowshoe. (Opp'n 8:19-24.) Further, Plaintiffs aver the
22 exercise of personal jurisdiction over Superpumper comports with notions of fair play and
23 substantial justice because the State of Nevada has an interest in keeping this case intact and in
24 Nevada, as it arises out of a state court judgment entered in Nevada against a one-time Nevada
25 resident, in favor of Plaintiffs, all of whom are Nevada residents. (Opp'n 9:7-26.)

26 Superpumper replies the pre-judgment transactions between Superpumper and Berry
27 Hinckley are irrelevant to the question of personal jurisdiction in this case, as they were not alleged
28 in the *Complaint*. (Reply 2:20-3:21.) Further, Superpumper argues it was neither the alleged

1 transferor, nor the alleged transferee, because “[t]he appropriate remedies to Herbst are to look to
2 the transferee who obtained the value of the transfer, or the transferor who allegedly made the
3 transfer with an intent to hinder the creditor (Herbst),” and relief can be afforded to plaintiffs
4 without necessitating Superpumper’s involvement in the case. (Reply 3:24-4:20.)

5 Where personal jurisdiction is decided without a full evidentiary hearing, the “plaintiff need
6 only make a *prima facie* showing of jurisdiction.” *Firouzabadi v. First Judicial Dist. Court*, 110
7 Nev. 1348, 1352, 885 P.2d 616, 618-19 (1994). “If the plaintiff makes a *prima facie* case of
8 jurisdiction prior to trial, the plaintiff must still prove personal jurisdiction at trial by a
9 preponderance of the evidence.” *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 693, 857
10 P.2d 740, 744 (1993). This showing must be made by “introducing competent evidence of essential
11 facts,” which can include affidavits, depositions, and other discovery materials. *Id.* at 692-93, 587
12 P.2d at 743-44. The Court “accepts all properly supported proffers of evidence by the plaintiff as
13 true” and resolves factual disputes in the plaintiff’s favor. *Id.* at 693, 857 P.2d at 744.

14 “To obtain jurisdiction over a non-resident defendant, a plaintiff must show: (1) that the
15 requirements of the state’s long-arm statute have been satisfied, and (2) that due process is not
16 offended by the exercise of jurisdiction.” *Id.* at 687, 698, 857 P.2d at 747; *see also* NRS 14.065(1).
17 Due process requires that “minimum contacts” exist “between the defendant and the forum state
18 ‘such that the maintenance of the suit does not offend traditional notions of fair play and substantial
19 justice. *Consipio Holding, BV v. Carlberg*, 128 Nev. ___, ___, 282 P.3d 751, 754 (2012) (quoting
20 *Trump*, 109 Nev. at 698, 857 P.2d at 747). The defendant should “reasonably anticipate being
21 haled into court” in the forum state due to its conduct and connection there. *Id.* at ___, 282 P.3d at
22 754 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). However,
23 “[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot
24 satisfy the requirement of contact with the forum state.” *MGM Grand, Inc. v. Eighth Judicial Dist.*
25 *Court*, 107 Nev. 65, 69, 807 P.2d 201, 203 (1991).

26 The Court applies a three part-inquiry to determine whether specific personal jurisdiction
27 exists, which consists of: (1) whether the defendant purposely availed itself to the privilege of
28 conducting business in the state, or purposefully directed its actions towards the state, (2) whether

1 the cause of action arises out of the defendant's forum-related activities, and (3) whether the
2 exercise of jurisdiction over the defendant is reasonable. *See Consipio*, 128 Nev. at ___, 282 P.3d
3 at 755.

4 Pursuant to the Nevada Uniform Fraudulent Transfer Act ("NUFTA"), a creditor may void a
5 transfer against the initial transferee of the asset, or *any subsequent transferee* that did not take in
6 good faith for value. NRS 112.220(2). Relief under NUFTA requires proof that the debtor made
7 the alleged fraudulent transfer with (a) "actual intent to hinder, delay or defraud any creditor," or
8 (b) the debtor, who was insolvent at the time or became so as a result of the transfer, did not receive
9 "reasonably equivalent value in exchange." NRS 112.180(1); NRS 112.190. A "transfer" includes
10 "every mode, direct or indirect, absolute or condition, voluntary or involuntary, or disposing of or
11 parting with an asset or an interest in an asset, and includes payment of money, release, lease and
12 creation of a lien or other encumbrance." NRS 112.150(12). In determining actual intent, NRS
13 112.180(2) lists eleven "badges of fraud" that may be considered, among other factors. *See In re*
14 *Nat'l Audit Defense Network*, 367 B.R. 207, 219-20 (Bank. D. Nev. 2007) ("Intent required for
15 actual fraudulent transfers is established by circumstantial evidence . . . courts have developed
16 'badges of fraud'—that is, recurring actions that historically have been associated with actual intent
17 to hinder, delay or defraud creditors."). A judgment may be entered against the first transferee of
18 the asset, or "[a]ny subsequent transferee other than a transferee who took in good faith for value or
19 from any subsequent transferee." NRS 112.220(2)(b) (emphasis added). Other relief may include
20 "[a]n injunction against further disposition by the debtor or transferee, or both, of the asset
21 transferred or of other property." NRS 112.210(1)(c)(1).

22 Acceptance of an alleged fraudulent transfer of Nevada assets may sustain a prima facie
23 showing of specific personal jurisdiction. *See Casentini v. Ninth Judicial Dist. Court*, 110 Nev.
24 721, 727, 887 P.2d 535, 539-40 (1994) (finding personal jurisdiction over a California resident who
25 was the primary or sole shareholder of a Nevada corporation, declared a Nevada address on the
26 corporate income tax form as his address, and engaged in allegedly fraudulent stock transfers
27 involving the Nevada corporation with his son, who was a Nevada resident). Further, intentional
28 conduct occurring outside the forum state, but designed to cause harm in the forum state, may be a

1 basis for finding minimum contacts. *Calder v. Jones*, 465 U.S. 783, 787-90 (1984) (holding that
2 defendants must “reasonably anticipated being haled into court [in the forum state]” because “their
3 intentional, and allegedly tortious, actions were expressly aimed at” the forum state, even though
4 they occurred outside the forum state, and “they knew that the brunt of th[e] injury would be felt” in
5 the forum state.”).

6 Here, resolving factual disputes in the Plaintiffs’ favor, the former Nevada assets, Mr.
7 Morabito’s shares of CWC, were merged into Superpumper, an out-of-state corporation owned and
8 operated by sophisticated businessmen and purported Nevada residents in order to facilitate an
9 alleged fraudulent transfers between corporations owned and operated by those same businessmen.
10 These transfers were allegedly a means of shielding the former Nevada assets from execution to
11 satisfy a judgment from a Nevada court. The Court must give deference to Plaintiffs’ allegations.
12 Plaintiffs allege Superpumper participated in the merger with the knowledge it was engaging in
13 business transactions for the purpose of defrauding Nevada residents of a judgment won in a
14 Nevada state court; these allegations of Defendants’ knowledge and actual involvement in the
15 alleged fraudulent business transactions support a finding that Superpumper purposefully availed
16 itself to Nevada jurisdiction. Superpumper’s contacts with Nevada were not the result of a
17 unilateral act of a third party, nor were they random or fortuitous; they are allegedly the direct and
18 intended consequence of the transfers in September 2010. The broad definition of “transfer” in
19 NRS 112.150(12) allows for personal jurisdiction to be exercised in Nevada based on the merger of
20 the Nevada parent company, CWC, into its Arizona subsidiary, Superpumper. Therefore, the Court
21 finds Superpumper purposefully availed itself to the conduct of business in Nevada, and/or
22 purposefully directed its actions towards Nevada, and Plaintiffs’ alleged injury arises out of this
23 alleged conduct.

24 The Court finds Defendants have failed to present a compelling case that exercise of
25 personal jurisdiction would be unreasonable under the global circumstances of this case. *See*
26 *Trump*, 109 Nev. at 700, 857 P.2d at 749-50 (noting that even when a defendant has sufficient
27 contacts with the forum state to establish specific jurisdiction, the defendant may still defeat
28

1 jurisdiction by making a compelling case that other factors render the exercise of jurisdiction
2 unreasonable).

3 The Court has considered the arguments of the parties and the record in its entirety.
4 Accordingly, and good cause appearing, Superpumper, Inc.'s *Motion to Dismiss Complaint for*
5 *Lack of Personal Jurisdiction (NRCP 12(b)(2))* is DENIED.

6 IT IS SO ORDERED.

7 DATED this 22nd day of July, 2014.

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11 JANET J. BERRY
12 District Judge
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 22nd day of July, 2014, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Gerald M. Gordon, Esq.
John P. Desmond, Esq.
Brian R. Irvine, Esq.
Barry L. Breslow, Esq.
Frank C. Gilmore, Esq.


Christine Kuhl

1 **2540**
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2 GERALD M. GORDON, ESQ.
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Fax: (775) 786-0131

9 *Attorneys for Plaintiffs*

10
11 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
12 **THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE**

13 JH, INC., a Nevada corporation; JERRY
HERBST, an individual; and BERRY-
14 HINCKLEY INDUSTRIES, a Nevada
corporation,

CASE NO.: CV13-02663

DEPT. NO.: 6

15 Plaintiffs,

16 vs.

17 PAUL MORABITO, individually and as
Trustee of the ARCADIA LIVING TRUST;
18 SUPERPUMPER, INC., an Arizona
corporation; EDWARD BAYUK,
19 individually and as Trustee of the EDWARD
WILLIAM BAYUK LIVING TRUST;
20 SALVATORE MORABITO, and individual;
and SNOWSHOE PETROLEUM, INC., a
21 New York corporation,

22 Defendants.
23

24 **NOTICE OF ENTRY OF ORDER**

25 PLEASE TAKE NOTICE that an Order denying Defendant Superpumper, Inc.'s Motion
26 to Dismiss Complaint for Lack of Personal Jurisdiction, was entered on the 22nd day of
27
28

1 July, 2014, in the above-captioned matter. A copy of the written order is attached hereto as
2 "Exhibit 1".

3 **AFFIRMATION**

4 **Pursuant to NRS 239B.030**

5 The undersigned does hereby affirm that the preceding document does not contain the
6 social security number of any person.

7 DATED this 22nd day of July, 2014.

8 GORDON SILVER
9

10 By: /s/ Brian R. Irvine
11 GERALD M. GORDON, ESQ.
12 Nevada Bar No. 229
13 Email: ggordon@gordonsilver.com
14 JOHN P. DESMOND
15 Nevada Bar No. 5618
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26 *Attorneys for Plaintiffs*
27
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CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF ORDER** on the parties as set forth below:

XXX Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices

_____ Certified Mail, Return Receipt Requested

_____ Via Facsimile (Fax)

_____ Via E-Mail

_____ Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered

_____ Federal Express (or other overnight delivery)

addressed as follows:

Barry Breslow
Frank Gilmore
ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, NV 89503

DATED this 22nd day of July, 2014.

/s/ Stephanie J. Glantz
An Employee of GORDON SILVER

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EXHIBIT TABLE

Exhibit	Description	Pages¹
1	Order, July 22, 2014	11

¹ Exhibit page counts are exclusive of exhibit slip sheets.

EXHIBIT 1

EXHIBIT 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

JH, INC., a Nevada corporation; JERRY
HERBST, an individual; and BERRY
HINCKLEY INDUSTRIES, a Nevada
corporation,

Plaintiffs,

Case No. CV13-02663

Dept. No. 1

vs.

PAUL MORABITO, individually and as Trustee
of the ARCADIA LIVING TRUST;
SUPERPUMPER, INC., an Arizona corporation;
EDWARD BAYUK, individually and as Trustee
of the EDWARD WILLIAM BAYUK LIVING
TRUST; SALVATORE MORABITO, an
individual; and SNOWSHOE PETROLEUM,
INC., a New York corporation,

Defendants.

ORDER

On June 19, 2014, Defendant Superpumper, Inc. ("Superpumper"), by and through counsel, Barry L. Breslow, Esq., and Frank C. Gilmore, Esq., filed *Defendant Superpumper Inc. 's Motion to Dismiss Complaint for Lack of Personal Jurisdiction (NRCp 12(b)(2))*. On July 7, 2014, Plaintiffs JH, Inc. ("JH"), Jerry Herbst ("Mr. Herbst"), and Berry Hinckley Industries ("Berry Hinckley") (collectively, "Plaintiffs"), by and through counsel, Gerald M. Gordon, Esq., John P. Desmond,

1 Esq., and Brian R. Irvine, Esq., filed an *Opposition to Motion to Dismiss*. On July 15, 2014,
2 Superpumper replied and submitted the matter for decision.¹

3 In 2007, JH and Consolidated Nevada Corporation² ("CNC") purchased Berry Hinkley
4 stock under an Amended and Restated Stock Purchase Agreement ("the Purchase Agreement").
5 (Compl. ¶ 14.) Defendant Paul Morabito ("Mr. Morabito") personally guaranteed CNC's
6 obligations under the Purchase Agreement. *Id.* A dispute arose between Plaintiffs, Mr. Morabito,
7 and CNC concerning the Purchase Agreement. (Compl. ¶ 15.) As a result, in December 2007, Mr.
8 Morabito and CNC brought an action against Plaintiffs in the Second Judicial District Court, Case
9 No. CV-02764, which was assigned to the Honorable Brent Adams ("the Department 6 Action").
10 (Compl. ¶ 16.) In the Department 6 Action, Plaintiffs filed a number of counterclaims against Mr.
11 Morabito and CNC, including fraud, misrepresentation, and breach of contract. (Compl. ¶ 17.) On
12 September 13, 2010, the Court entered oral judgment in favor of Plaintiffs on a number of fraud-
13 based claims, followed by findings of fact and conclusions of law entered a month later. (Compl.
14 ¶¶ 18-19.) On August 23, 2011, the Court entered a judgment awarding Plaintiffs damages in the
15 amount of \$149,444,777.80 ("the Judgment"). (Compl. ¶ 20.)

16 While Mr. Morabito and CNC's appeal of the Judgment was pending before the Nevada
17 Supreme Court, the parties entered into a Settlement Agreement and Mutual Release ("the
18 Settlement Agreement") on November 30, 2011. (Compl. ¶ 21.) The Settlement Agreement
19 provided the parties would agree to vacate the appeal, as well as the Judgment, in exchange for
20 executing an \$85 million confession of judgment ("the Confessed Judgment"). *Id.* In the
21 Settlement Agreement, Mr. Morabito and CNC agreed timely pay their financial obligations, and to
22 submit themselves to the jurisdiction of the Second Judicial District Court for any dispute relating
23 to the Settlement Agreement. *Id.* Plaintiffs allege Mr. Morabito and CNC did not intend to comply
24 with the terms of the Settlement Agreement, and induced Plaintiffs into executing the Settlement
25

26
27 ¹ On July 17, 2014, the Court entered an *Order denying Defendant Snowshoe Petroleum, Inc.'s Motion to Dismiss*
28 *Complaint for Lack of Personal Jurisdiction (NRC P 12(b)(2))*.

²At the time of the Purchase Agreement, CNC's predecessor-in-interest was "P.A. Morabito & Co." (Compl. ¶ 9.)

1 Agreement in order to delay and avoid execution and collection of the Judgment so that they would
2 have more time to transfer and dissipate assets. (Compl. ¶ 23.)

3 Shortly after executing the Settlement Agreement, Mr. Morabito and CNC allegedly failed
4 to comply with several of its terms and defaulted. (Compl. ¶ 24.) Following the default, the parties
5 executed a Forbearance Agreement on March 1, 2013. (Compl. ¶¶ 25-26.) The Forbearance
6 Agreement provided that in the event of its default, or of default under the Settlement Agreement
7 (other than the acknowledged continuing defaults), Plaintiffs were entitled to immediately exercise
8 and enforce their rights and remedies under the Settlement Agreement. (Compl. ¶ 29.) Plaintiffs
9 allege Mr. Morabito and CNC did not intend to comply with the terms of the Forbearance
10 Agreement, and induced Plaintiffs into executing the Forbearance Agreement in order to delay and
11 avoid execution and collection of the Judgment so that they would have more time to transfer and
12 dissipate assets. (Compl. ¶ 30.)

13 Plaintiffs allege Mr. Morabito and CNC failed to comply with the terms of the Forbearance
14 Agreement, and on June 18, 2013, Plaintiffs filed the Confessed Judgment with the Second Judicial
15 District Court, resulting in Mr. Morabito and CNC being jointly and severally indebted to Plaintiffs
16 in the amount of \$85 million. (Compl. ¶¶ 31-32.) Plaintiffs allege Defendants engaged in a series
17 of fraudulent transfers to related parties, including Superpumper, in an effort to prevent collection
18 of the Judgment or Confessed Judgment, and to protect Mr. Morabito from having any of his assets
19 seized. (Compl. ¶ 34.)

20 Plaintiffs have filed six claims against Defendants: (1) for fraudulent transfers under NRS
21 Chapter 112 against all Defendants; (2) for breach of contract against Mr. Morabito; (3) for breach
22 of the implied covenant of good faith and fair dealing against Mr. Morabito; (4) for fraudulent
23 inducement/misrepresentation against Mr. Morabito; (5) for civil conspiracy against all Defendants;
24 and (6) for aiding and abetting fraudulent misrepresentation against Bayuk, Salvatore Morabito,
25 Snowshoe Petroleum, Inc. ("Snowshoe"), and Superpumper. (Compl. ¶¶ 36-85.) Plaintiffs request
26 compensatory and punitive damages, reasonable attorney fees and costs, garnishments against
27 Defendants who received the fraudulent assets, avoidance of the transfer of obligation to the extent
28

1 necessary to satisfy Plaintiffs' claim, and attachment or other provisional remedy against the asset
2 transferred or other property of Defendants.

3 The following alleged facts are relevant to the resolution of this *Motion to Dismiss*: Mr.
4 Morabito was a director and shareholder of Consolidated Western Corporation ("CWC"), a Nevada
5 Corporation. (Opp'n Ex. 3.) Mr. Morabito's brother, Salvatore Morabito, was vice-president of
6 CWC. *Id.* Mr. Morabito owned 80% of CWC. (Compl. ¶ 35.) Salvatore Morabito owned 10% of
7 CWC, and Edward Bayuk, Mr. Morabito's domestic partner, also owned 10%.³ *Id.*

8 On September 29, 2010, CWC merged into Superpumper, an Arizona corporation. *Id.*
9 CWC was previously Superpumper's parent corporation. (Opp'n Ex. 5-8.) Mr. Morabito also
10 owned 80% of the shares in Superpumper. *Id.* Superpumper's principal place of business is
11 Maricopa County, Arizona, and it owns a number of gas stations and convenience stores throughout
12 Arizona. (Compl. ¶ 6; Mtn. Ex. 1, ¶ 6.) Superpumper was incorporated in 1982, and its
13 shareholders are Salvatore Morabito and Bayuk. (Mtn. Ex. 1, ¶ 2-3.)

14 The next day, Mr. Morabito sold his 80% interest in Superpumper to Snowshoe for
15 approximately \$2.5 million, despite the fact that the shares had allegedly been valued at more than
16 \$5.5 million in 2009. *Id.* Plaintiffs allege this transfer and others were done in an effort to avoid
17 collection on the Judgment and Confession of Judgment. (Compl. ¶ 35.) Plaintiffs aver the Second
18 Judicial District Court has jurisdiction over the matter because Defendants reside or are located in
19 Washoe County, the activities complained of occurred in Washoe County, the alleged fraudulent
20 transfers originated from Washoe County, and/or Defendants expressly agreed to submit themselves
21 to the Second Judicial District Court's jurisdiction. (Compl. ¶ 11.)

22 In its *Motion to Dismiss*, Superpumper argues the Court lacks personal jurisdiction over it
23 under Nevada's long-arm statute because Plaintiff fails to allege Superpumper had any contacts
24 with Nevada, aside from formerly being held by its parent company, CWC. (Mtn. 2:13-21.)

25
26 ³ Mr. Morabito, Salvatore Morabito, and Bayuk all allegedly resided in Nevada at some point, though the exact dates of
their residencies is unclear. (Compl. ¶ 4, ¶ 7, ¶ 9; Opp'n Ex. 11, Ex. 13.)

27 Mr. Herbst, who owns JH, is a Nevada resident. (Compl. ¶ 2.) JH is a Nevada corporation with its principal place of
28 business in Washoe County. (Compl. ¶ 1.) JH also owns Berry Hinckley, which is a Nevada corporation with its
principal place of business in Washoe County. (Compl. ¶ 1, ¶ 3.)

1 Superpumper contends it never participated in any transactions that “originated” in Washoe County,
2 the merger of CWC into Superpumper did not involve the transfer of any assets, and therefore has
3 not had any contact with Nevada that justifies the exercise of personal jurisdiction. (Mtn. 3:9-24.)

4 Superpumper argues Nevada lacks general jurisdiction over it because Plaintiffs have not
5 alleged it has a systematic and continuous presence in the state. (Mtn. 5:27-6:19.) Further,
6 Superpumper argues Nevada does not have specific jurisdiction over it due to its alleged conspiracy
7 with one-time Nevada residents because a number of courts rejected the theory of conspiracy
8 jurisdiction; even if the Court adopted that theory, a bare allegation of conspiracy between the
9 defendant and a person within the personal jurisdiction of the court is insufficient to establish
10 personal jurisdiction over the defendant. (Mtn. 6:22-8:5.) Further, Superpumper has not purposely
11 directed any contact towards Nevada, as it was formed in the early 1980s and has never availed
12 itself to the privileges of doing business in Nevada. (Mtn. 8:8-8:16.) Superpumper alleges the
13 purported transfer only “regarded” Superpumper shares, but did not “include or involve
14 Superpumper in any meaningful way.” (Mtn. 8:17-19.) Superpumper alleges that it was the asset
15 transferred during the CWC merger, rather than the beneficiary of any purported transfer. (Mtn.
16 8:24-25.)

17 Plaintiffs allege that during Mr. Morabito’s ownership of Berry Hinckley, Mr. Morabito
18 transferred Berry Hinckley assets to related entities; specifically, in 2006, Mr. Morabito allegedly
19 transferred nearly \$4 million from Berry Hinckley to Superpumper. (Opp’n 2:20-22, Ex. 3.)
20 Plaintiffs further allege Mr. Morabito and CNC used Berry Hinckley assets for the benefit of Mr.
21 Morabito’s other entities, including Superpumper. (Opp’n 2:22-28.) Plaintiffs cite to three
22 instances where Mr. Morabito and CNC paid Superpumper’s legal fees in the amount of nearly
23 \$150,000 with Berry Hinckley assets. (Opp’n 3:1-10, Ex. 4.) Further, Plaintiffs contend the merger
24 of CWC into Superpumper occurred after the oral decision in the Department 6 Action, and
25 effectively took at least \$.5 million owned by a Nevada judgment debtor out of Nevada and placed
26 it into an Arizona company. (Opp’n 4:6-23.) The subsequent transfer of Superpumper assets to
27 Snowshoe demonstrates further attempts to evade the Nevada judgment. (Opp’n 4:24-5:2.)
28

1 Plaintiffs also respond they are asserting that specific, not general, jurisdiction applies in
2 this case. (Opp'n 5:16-20.) Plaintiffs contend they have presented the Court with evidence outside
3 the allegations in the Complaint that make a prima facie case for personal jurisdiction, as they have
4 demonstrated Superpumper performed acts that resulted in purposeful availment to the Court's
5 jurisdiction, and their claims against Superpumper arise directly out of Superpumper's Nevada-
6 related activities. (Opp'n 6:22-25.) Superpumper routinely received funds from Berry Hinckley
7 (nearly \$4 million in 2006), Berry Hinckley paid Superpumper's legal fees, and the underlying
8 judgment in this case relates to Mr. Morabito's sale of Berry Hinckley to Plaintiffs. (Opp'n 7:6-
9 11.) Plaintiffs argue the CWC merger into Superpumper was undertaken at Mr. Morabito and his
10 co-conspirators' direction with the intent to stop or hinder Plaintiffs from collecting their Nevada
11 judgment, given then timing and the effort undertaken to move the asset from Nevada to an entity
12 formed in Arizona, and later sell the interest to a New York company, and from Mr. Morabito to
13 related to third parties. (Opp'n 7:12-18.) Plaintiffs allege these facts, taken together, demonstrate
14 Superpumper purposefully availed itself to jurisdiction by (1) accepting funds from Berry Hinckley,
15 a Nevada company, without providing any value to Berry Hinckley prior to the sale of Berry
16 Hinckley to JH; (2) by accepting and participating in, post-judgment, the merger of CWC and
17 knowingly receiving the fraudulent transfer of this Nevada asset. (Opp'n 8:1-7) Plaintiffs clarify
18 that a conspiracy theory is not the basis of their assertion of personal jurisdiction; instead, Plaintiffs
19 argue Superpumper has availed itself to the jurisdiction of Nevada court because it was the recipient
20 of a Nevada asset from a Nevada judgment creditor, and it knowingly took the asset through merger
21 to facilitate the fraudulent transfer to Snowshoe. (Opp'n 8:19-24.) Further, Plaintiffs aver the
22 exercise of personal jurisdiction over Superpumper comports with notions of fair play and
23 substantial justice because the State of Nevada has an interest in keeping this case intact and in
24 Nevada, as it arises out of a state court judgment entered in Nevada against a one-time Nevada
25 resident, in favor of Plaintiffs, all of whom are Nevada residents. (Opp'n 9:7-26.)

26 Superpumper replies the pre-judgment transactions between Superpumper and Berry
27 Hinckley are irrelevant to the question of personal jurisdiction in this case, as they were not alleged
28 in the *Complaint*. (Reply 2:20-3:21.) Further, Superpumper argues it was neither the alleged

1 transferor, nor the alleged transferee, because “[t]he appropriate remedies to Herbst are to look to
2 the transferee who obtained the value of the transfer, or the transferor who allegedly made the
3 transfer with an intent to hinder the creditor (Herbst),” and relief can be afforded to plaintiffs
4 without necessitating Superpumper’s involvement in the case. (Reply 3:24-4:20.)

5 Where personal jurisdiction is decided without a full evidentiary hearing, the “plaintiff need
6 only make a *prima facie* showing of jurisdiction.” *Firouzabadi v. First Judicial Dist. Court*, 110
7 Nev. 1348, 1352, 885 P.2d 616, 618-19 (1994). “If the plaintiff makes a *prima facie* case of
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22 754 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). However,
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11 parting with an asset or an interest in an asset, and includes payment of money, release, lease and
12 creation of a lien or other encumbrance." NRS 112.150(12). In determining actual intent, NRS
13 112.180(2) lists eleven "badges of fraud" that may be considered, among other factors. *See In re*
14 *Nat'l Audit Defense Network*, 367 B.R. 207, 219-20 (Bank. D. Nev. 2007) ("Intent required for
15 actual fraudulent transfers is established by circumstantial evidence . . . courts have developed
16 'badges of fraud'—that is, recurring actions that historically have been associated with actual intent
17 to hinder, delay or defraud creditors."). A judgment may be entered against the first transferee of
18 the asset, or "[a]ny subsequent transferee other than a transferee who took in good faith for value or
19 from any subsequent transferee." NRS 112.220(2)(b) (emphasis added). Other relief may include
20 "[a]n injunction against further disposition by the debtor or transferee, or both, of the asset
21 transferred or of other property." NRS 112.210(1)(c)(1).

22 Acceptance of an alleged fraudulent transfer of Nevada assets may sustain a prima facie
23 showing of specific personal jurisdiction. *See Casentini v. Ninth Judicial Dist. Court*, 110 Nev.
24 721, 727, 887 P.2d 535, 539-40 (1994) (finding personal jurisdiction over a California resident who
25 was the primary or sole shareholder of a Nevada corporation, declared a Nevada address on the
26 corporate income tax form as his address, and engaged in allegedly fraudulent stock transfers
27 involving the Nevada corporation with his son, who was a Nevada resident). Further, intentional
28 conduct occurring outside the forum state, but designed to cause harm in the forum state, may be a

1 basis for finding minimum contacts. *Calder v. Jones*, 465 U.S. 783, 787-90 (1984) (holding that
2 defendants must “reasonably anticipated being haled into court [in the forum state]” because “their
3 intentional, and allegedly tortious, actions were expressly aimed at” the forum state, even though
4 they occurred outside the forum state, and “they knew that the brunt of th[e] injury would be felt” in
5 the forum state.”).

6 Here, resolving factual disputes in the Plaintiffs’ favor, the former Nevada assets, Mr.
7 Morabito’s shares of CWC, were merged into Superpumper, an out-of-state corporation owned and
8 operated by sophisticated businessmen and purported Nevada residents in order to facilitate an
9 alleged fraudulent transfers between corporations owned and operated by those same businessmen.
10 These transfers were allegedly a means of shielding the former Nevada assets from execution to
11 satisfy a judgment from a Nevada court. The Court must give deference to Plaintiffs’ allegations.
12 Plaintiffs allege Superpumper participated in the merger with the knowledge it was engaging in
13 business transactions for the purpose of defrauding Nevada residents of a judgment won in a
14 Nevada state court; these allegations of Defendants’ knowledge and actual involvement in the
15 alleged fraudulent business transactions support a finding that Superpumper purposefully availed
16 itself to Nevada jurisdiction. Superpumper’s contacts with Nevada were not the result of a
17 unilateral act of a third party, nor were they random or fortuitous; they are allegedly the direct and
18 intended consequence of the transfers in September 2010. The broad definition of “transfer” in
19 NRS 112.150(12) allows for personal jurisdiction to be exercised in Nevada based on the merger of
20 the Nevada parent company, CWC, into its Arizona subsidiary, Superpumper. Therefore, the Court
21 finds Superpumper purposefully availed itself to the conduct of business in Nevada, and/or
22 purposefully directed its actions towards Nevada, and Plaintiffs’ alleged injury arises out of this
23 alleged conduct.


24 The Court finds Defendants have failed to present a compelling case that exercise of
25 personal jurisdiction would be unreasonable under the global circumstances of this case. *See*
26 *Trump*, 109 Nev. at 700, 857 P.2d at 749-50 (noting that even when a defendant has sufficient
27 contacts with the forum state to establish specific jurisdiction, the defendant may still defeat
28

1 jurisdiction by making a compelling case that other factors render the exercise of jurisdiction
2 unreasonable).

3 The Court has considered the arguments of the parties and the record in its entirety.
4 Accordingly, and good cause appearing, Superpumper, Inc.'s *Motion to Dismiss Complaint for*
5 *Lack of Personal Jurisdiction (NRCP 12(b)(2))* is DENIED.

6 IT IS SO ORDERED.

7 DATED this 22nd day of July, 2014.

8
9
10 
11 JANET J. BERRY
District Judge
12
13
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28

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 22nd day of July, 2014, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Gerald M. Gordon, Esq.
John P. Desmond, Esq.
Brian R. Irvine, Esq.
Barry L. Breslow, Esq.
Frank C. Gilmore, Esq.


Christine Kuhl

1130
BARRY L. BRESLOW, ESQ. – NSB #3023
bbreslow@rbsllaw.com
FRANK C. GILMORE, ESQ. - NSB #10052
krobison@rbsllaw.com
Robison, Belaustegui, Sharp & Low
A Professional Corporation
71 Washington Street
Reno, Nevada 89503
Telephone: (775) 329-3151
Facsimile: (775) 329-7169

Attorneys for Defendants Snowshoe Petroleum,
Inc., Superpumper, Inc., and Paul Morabito,
individually and as Trustee
of the Arcadia Living Trust

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JH, INC., a Nevada corporation; JERRY
HERBST, an individual; and BERRY-
HINCKLEY INDUSTRIES, a Nevada
corporation

CASE NO.: CV13-02663

DEPT. NO.: B1

Plaintiffs,

vs.

PAUL MORABITO, individually and as Trustee
of the ARCADIA LIVING TRUST;
SUPERPUMPER, INC., an Arizona corporation;
EDWARD BAYUK, individually and as Trustee
of the EDWARD WILLIAM BAYUK LIVING
TRUST; and SNOWSHOE PETROLEUM,
INC., a New York corporation,

Defendants.

ANSWER TO COMPLAINT OF SUPERPUMPER, INC., AND SNOWSHOE
PETROLEUM, INC.

Defendants, Superpumper, Inc., and Snowshoe Petroleum, Inc. (“Defendants”), by and
through counsel, Robison, Belaustegui, Sharp & Low, hereby respond to the Complaint filed in
this matter as follows:

1. These answering Defendants Lack sufficient information to admit or deny the

1 allegations contained in paragraph 1 of the Complaint, but believe it to be true.

2 2. These answering Defendants Lack sufficient information to admit or deny the
3 allegations contained in paragraph 2 of the Complaint, but believe it to be true.

4 3. These answering Defendants Lack sufficient information to admit or deny the
5 allegations contained in paragraph 3 of the Complaint, but believe it to be true.

6 4. These answering Defendants admit that Morabito is a resident of Los Angeles
7 County, California, but deny the remaining allegations contained in paragraph 4 of the Complaint.

8 5. These answering Defendants admit the allegations contained in paragraph 5 of the
9 Complaint.

10 6. These answering Defendants admit that Superpumper is an Arizona corporation
11 with its principal place of business in Maricopa County, Arizona, but deny the remainder of the
12 allegations contained in paragraph 6 of the Complaint.

13 7. These answering Defendants deny the allegations contained in paragraph 7 of the
14 Complaint.

15 8. These answering Defendants Lack sufficient information to admit or deny the
16 allegations contained in paragraph 8 of the Complaint and therefore deny the same.

17 9. These answering Defendants deny the allegations contained in paragraph 9 of the
18 Complaint.

19 10. These answering Defendants admit that Snowshoe Petroleum is a New York
20 Corporation, but deny the remainder of the allegations contained in paragraph 10 of the Complaint.

21 11. These answering Defendants deny the allegations contained in paragraph 11 of the
22 Complaint.

23 12. These answering Defendants deny the allegations contained in paragraph 12 of the
24 Complaint.

25 13. In response to the allegations contained in paragraph 13 of the Complaint, these
26 answering Defendants incorporate their responses to the proceeding allegations contained in the
27 Complaint as if fully set forth herein.

28 14. These answering Defendants admit the allegations contained in paragraph 14 of the

1 Complaint.
2 15. These answering Defendants admit the allegations contained in paragraph 15 of the
3 Complaint.
4 16. These answering Defendants admit the allegations contained in paragraph 16 of the
5 Complaint.
6 17. These answering Defendants admit the allegations contained in paragraph 17 of the
7 Complaint.
8 18. The Judgment referred to in paragraph 18 of the Complaint speaks for itself, but has
9 since been voided nunc pro tunc.
10 19. The Judgment referred to in paragraph 19 of the Complaint speaks for itself, but has
11 since been voided nunc pro tunc.
12 20. The Judgment referred to in paragraph 20 of the Complaint speaks for itself, but has
13 since been voided nunc pro tunc.
14 21. These answering Defendants admit that the document speaks for itself.
15 22. These answering Defendants admit the allegations contained in paragraph 22 of the
16 Complaint.
17 23. These answering Defendants deny the allegations contained in paragraph 23 of the
18 Complaint.
19 24. These answering Defendants admit the allegations contained in paragraph 24 of the
20 Complaint.
21 25. These answering Defendants admit the allegations contained in paragraph 25 of the
22 Complaint.
23 26. These answering Defendants admit the allegations contained in paragraph 26 of the
24 Complaint.
25 27. The document referred to in paragraph 27 of the Complaint speaks for itself.
26 28. The document referred to in paragraph 28 of the Complaint speaks for itself.
27 29. The document referred to in paragraph 29 of the Complaint speaks for itself.
28 30. These answering Defendants deny the allegations contained in paragraph 30 of the

1 Complaint.
2 31. These answering Defendants admit the allegations contained in paragraph 31 of the
3 Complaint.
4 32. These answering Defendants admit that Plaintiffs improperly filed the Confession.
5 33. These answering Defendants deny the allegations contained in paragraph 33 of the
6 Complaint.
7 34. These answering Defendants deny allegations contained in paragraph 34 of the
8 Complaint.
9 35. These answering Defendants deny the allegations contained in paragraph 35 of the
10 Complaint.
11 36. In response to the allegations contained in paragraph 36 of the Complaint, these
12 answering Defendants incorporates their responses to the proceeding allegations contained in the
13 Complaint as if fully set forth herein.
14 37. These answering Defendants admit the allegations contained in paragraph 37 of the
15 Complaint.
16 38. These answering Defendants deny the allegations contained in paragraph 38 of the
17 Complaint.
18 39. These answering Defendants deny the allegations contained in paragraph 39 of the
19 Complaint.
20 40. These answering Defendants deny the allegations contained in paragraph 40 of the
21 Complaint.
22 41. These answering Defendants deny the allegations contained in paragraph 41 of the
23 Complaint.
24 42. These answering Defendants deny the allegations contained in paragraph 42 of the
25 Complaint.
26 43. These answering Defendants deny the allegations contained in paragraph 43 of the
27 Complaint.
28 44. These answering Defendants deny the allegations contained in paragraph 44 of the

1 Complaint.
2 45. These answering Defendants deny the allegations contained in paragraph 45 of the
3 Complaint.
4 46. These answering Defendants deny the allegations contained in paragraph 46 of the
5 Complaint.
6 47. These answering Defendants deny the allegations contained in paragraph 47 of the
7 Complaint.
8 48. These answering Defendants deny the allegations contained in paragraph 48 of the
9 Complaint.
10 49. These answering Defendants deny the allegations contained in paragraph 49 of the
11 Complaint.
12 50. In response to the allegations contained in paragraph 50 of the Complaint, these
13 answering Defendants incorporates their responses to the proceeding allegations contained in the
14 Complaint as if fully set forth herein.
15 51. These answering Defendants admit that the documents referred to in paragraph 51
16 of the Complaint speak for themselves.
17 52. These answering Defendants deny the allegations contained in paragraph 52 of the
18 Complaint.
19 53. These answering Defendants deny the allegations contained in paragraph 53 of the
20 Complaint.
21 54. These answering Defendants deny the allegations contained in paragraph 54 of the
22 Complaint.
23 55. These answering Defendants deny the allegations contained in paragraph 55 of the
24 Complaint.
25 56. These answering Defendants deny the allegations contained in paragraph 56 of the
26 Complaint.
27 57. These answering Defendants deny the allegations contained in paragraph 57 of the
28 Complaint.

1 58. In response to the allegations contained in paragraph 58 of the Complaint, these
2 answering Defendants incorporates their responses to the proceeding allegations contained in the
3 Complaint as if fully set forth herein.

4 59. These answering Defendants admit that the documents referred to in paragraph 59
5 of the Complaint speak for themselves.

6 60. These answering Defendants deny the allegations contained in paragraph 60 of the
7 Complaint.

8 61. These answering Defendants deny the allegations contained in paragraph 61 of the
9 Complaint.

10 62. These answering Defendants deny the allegations contained in paragraph 62 of the
11 Complaint.

12 63. These answering Defendants deny the allegations contained in paragraph 63 of the
13 Complaint.

14 64. In response to the allegations contained in paragraph 64 of the Complaint, these
15 answering Defendants incorporates their responses to the proceeding allegations contained in the
16 Complaint as if fully set forth herein.

17 65. These answering Defendants deny the allegations contained in paragraph 65 of the
18 Complaint.

19 66. These answering Defendants deny the allegations contained in paragraph 66 of the
20 Complaint.

21 67. These answering Defendants deny the allegations contained in paragraph 67 of the
22 Complaint.

23 68. These answering Defendants deny the allegations contained in paragraph 68 of the
24 Complaint.

25 69. These answering Defendants deny the allegations contained in paragraph 69 of the
26 Complaint.

27 70. These answering Defendants deny the allegations contained in paragraph 70 of the
28 Complaint.

1 71. These answering Defendants deny the allegations contained in paragraph 71 of the
2 Complaint.

3 72. These answering Defendants deny the allegations contained in paragraph 72 of the
4 Complaint.

5 73. In response to the allegations contained in paragraph 73 of the Complaint, these
6 answering Defendants incorporates their responses to the proceeding allegations contained in the
7 Complaint as if fully set forth herein.

8 74. These answering Defendants deny the allegations contained in paragraph 74 of the
9 Complaint.

10 75. These answering Defendants deny the allegations contained in paragraph 75 of the
11 Complaint.

12 76. These answering Defendants deny the allegations contained in paragraph 76 of the
13 Complaint.

14 77. These answering Defendants deny the allegations contained in paragraph 77 of the
15 Complaint.

16 78. These answering Defendants deny the allegations contained in paragraph 78 of the
17 Complaint.

18 79. These answering Defendants deny the allegations contained in paragraph 79 of the
19 Complaint.

20 80. These answering Defendants deny the allegations contained in paragraph 80 of the
21 Complaint.

22 81. These answering Defendants Lack sufficient information to admit or deny the
23 allegations contained in paragraph 81 of the Complaint and therefore deny the same.

24 82. In response to the allegations contained in paragraph 82 of the Complaint, these
25 answering Defendants incorporates their responses to the proceeding allegations contained in the
26 Complaint as if fully set forth herein.

27 83. These answering Defendants deny the allegations contained in paragraph 83 of the
28 Complaint.

1 84. These answering Defendants deny the allegations contained in paragraph 84 of the
2 Complaint.

3 85. These answering Defendants deny the allegations contained in paragraph 85 of the
4 Complaint.

5 **AFFIRMATIVE DEFENSES**

6 1. Plaintiffs have waived their claims.

7 2. Plaintiffs are estopped from proceeding with their claims.

8 3. Plaintiffs proceeded in bad faith and in violation of their duty to provide Defendants
9 with the benefit of the bargain.

10 4. Plaintiffs have breached their contractual promises.

11 5. To the extent Plaintiffs are attempting to enforce unwritten provisions, the statute of
12 frauds prohibits them from doing so.

13 6. Plaintiffs have been unjustly enriched by virtue of their false assertions and by and
14 through instituting this legal proceeding.

15 7. The Plaintiffs' Complaint is an abuse of process and is being maliciously prosecuted.

16 8. The Plaintiffs, by and through their representatives and partners, were actively
17 negligent.

18 9. The Plaintiffs, by and through their representatives and partners, are comparatively
19 negligent to the extent that Plaintiffs' negligence exceeds the negligence, if any, of these answering
20 Defendants.

21 10. The Plaintiffs have failed and refused to mitigate the damages, if any, they have
22 sustained.

23 11. Laches bars Plaintiffs' claims.

24 12. The Plaintiffs, by and through their manager, representatives and partners, expressly
25 consented to and authorized the conduct of the Defendants now complained of and Plaintiffs are
26 therefore estopped from recovering on their claim.

27 13. The cause of Plaintiffs' damages, if any, is a result of their own inept conduct and in the
28 alternative, is caused by third parties unrelated to the Defendants named herein.

1 14. Plaintiffs' negligent conduct proximately caused whatever damages they have
2 sustained.

3 15. These answering Defendants is entitled to setoff.

4 16. All alleged improper acts allegedly committed by these answering Defendants was
5 accepted, approved and ratified by the Plaintiffs.

6 17. Plaintiffs' Complaint fails to state claims upon which relief can be granted.

7 18. Plaintiffs' claims are barred by the election of remedies.

8 19. Discovery has not yet commenced and these answering Defendants reserve the right to
9 amend this Answer to include additional affirmative defenses as the discovery process proceeds.

10 20. Plaintiff's claims are barred by the applicable statute of limitations.

11 WHEREFORE, Defendants requests judgment in their favor against the Plaintiffs and further
12 requests that said judgment include an award of attorney's fees and Court costs against the Plaintiffs.

13 **AFFIRMATION**
14 **Pursuant to NRS 239B.030**

15 The undersigned does hereby affirm that this document does not contain the social security
16 number of any person.

17 DATED this 28th day of July, 2014.

18 ROBISON, BELAUSTEGUI, SHARP & LOW
19 A Professional Corporation
20 71 Washington Street
 Reno, Nevada 89503

21 _____
22 /s/ FRANK C. GILMORE
23 BARRY L. BRESLOW, ESQ.
24 FRANK C. GILMORE, ESQ.
25 Attorneys for Attorneys for Defendants Snowshoe
26 Petroleum, Inc., Superpumper, Inc., and Paul
27 Morabito, individually and as Trustee of the Arcadia
28 Living Trust

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Robison, Belaustegui, Sharp &
3 Low, and that on this date I caused to be served a true copy of the **ANSWER TO COMPLAINT**
4 **OF SUPERPUMPER, INC., AND SNOWSHOE PETROLEUM, INC.** all parties to this action
5 by the method(s) indicated below:

6 X by placing an original or true copy thereof in a sealed envelope, with
7 sufficient postage affixed thereto, in the United States mail at Reno,
8 Nevada, addressed to:

9 Gerald Gordon, Esq.
10 John Desmond, Esq.
11 Brian Irvine, Esq.
12 Gordon Silver
13 100 West Liberty Street, Suite 940
14 Reno, Nevada 89501

15 X by using the Court's CM/ECF Electronic Notification System addressed to:

16 Gerald Gordon, Esq.
17 ggordon@gordonsilver.com

18 John Desmond, Esq.
19 jdesmond@gordonsilver.com

20 Brian Irvine, Esq.
21 birvine@gordonsilver.com

22 _____ by personal delivery/hand delivery addressed to:

23 _____ by facsimile (fax) addressed to:

24 _____ by Federal Express/UPS or other overnight delivery addressed to:

25 DATED: This 28th day of July, 2014.

26 /s/Jennifer Jacobsen

1 1130

BARRY L. BRESLOW, ESQ. – NSB #3023

2 bbreslow@rbsllaw.com

FRANK C. GILMORE, ESQ. - NSB #10052

3 fgilmore@rbsllaw.com

Robison, Belaustegui, Sharp & Low

4 A Professional Corporation

71 Washington Street

5 Reno, Nevada 89503

Telephone: (775) 329-3151

6 Facsimile: (775) 329-7169

7 Attorneys for Defendants Snowshoe Petroleum,
Inc., Superpumper, Inc., Paul Morabito, individually
8 and as Trustee of the Arcadia Living Trust
Edward Bayuk, individually and as Trustee of the
9 Edward William Bayuk Living Trust, and
Salvatore Morabito

11 **IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**

12 **IN AND FOR THE COUNTY OF WASHOE**

14 JH, INC., a Nevada corporation; JERRY
HERBST, an individual; and BERRY-
15 HINCKLEY INDUSTRIES, a Nevada
corporation

CASE NO.: CV13-02663

DEPT. NO.: B1

16 Plaintiffs,

17 vs.

18 PAUL MORABITO, individually and as Trustee
19 of the ARCADIA LIVING TRUST;
SUPERPUMPER, INC., an Arizona corporation;
20 EDWARD BAYUK, individually and as Trustee
of the EDWARD WILLIAM BAYUK LIVING
21 TRUST; SALVATORE MORABITO, an
individual; and SNOWSHOE PETROLEUM,
22 INC., a New York corporation,

23 Defendants.

24
25 **ANSWER TO COMPLAINT OF DEFENDANTS EDWARD BAYUK, INDIVIDUALLY**
26 **AND AS TRUSTEE OF THE EDWARD WILLIAM BAYUK LIVING TRUST, AND**
SALVATORE MORABITO.

27 Defendants, Edward Bayuk, individually and as Trustee of the Edward William Bayuk
28 Living Trust, and Salvatore Morabito (collectively referred to herein as “Defendants”), by and

1 through counsel, Robison, Belaustegui, Sharp & Low, hereby respond to the Complaint filed in
2 this matter as follows:

3 1. These answering Defendants lack sufficient information to admit or deny the
4 allegations contained in paragraph 1 of the Complaint, but believe it to be true.

5 2. These answering Defendants lack sufficient information to admit or deny the
6 allegations contained in paragraph 2 of the Complaint, but believe it to be true.

7 3. These answering Defendants lack sufficient information to admit or deny the
8 allegations contained in paragraph 3 of the Complaint, but believe it to be true.

9 4. These answering Defendants admit that Morabito is a resident of Los Angeles
10 County, California, but deny the remaining allegations contained in paragraph 4 of the Complaint.

11 5. These answering Defendants admit the allegations contained in paragraph 5 of the
12 Complaint.

13 6. These answering Defendants admit that Superpumper is an Arizona corporation
14 with its principal place of business in Maricopa County, Arizona, but deny the remainder of the
15 allegations contained in paragraph 6 of the Complaint.

16 7. These answering Defendants admit that Edward Bayuk is and was President of
17 Superpumper. These answering Defendants deny the remaining allegations contained in paragraph
18 7 of the Complaint.

19 8. These answering Defendants admit that Bayuk is also the Trustee of the Edward
20 William Bayuk Living Trust, but deny the remaining allegations contained in paragraph 8 of the
21 Complaint.

22 9. These answering Defendants admit that Salvatore Morabito is the brother of Paul
23 Morabito, but deny the remaining allegations contained in paragraph 9 of the Complaint.

24 10. These answering Defendants admit that Snowshoe Petroleum is a New York
25 Corporation, but deny the remainder of the allegations contained in paragraph 10 of the Complaint.

26 11. These answering Defendants deny the allegations contained in paragraph 11 of the
27 Complaint.

28 12. These answering Defendants deny the allegations contained in paragraph 12 of the

1 Complaint.

2 13. In response to the allegations contained in paragraph 13 of the Complaint, these
3 answering Defendants incorporate their responses to the proceeding allegations contained in the
4 Complaint as if fully set forth herein.

5 14. These answering Defendants admit the allegations contained in paragraph 14 of the
6 Complaint.

7 15. These answering Defendants admit the allegations contained in paragraph 15 of the
8 Complaint.

9 16. These answering Defendants admit the allegations contained in paragraph 16 of the
10 Complaint.

11 17. These answering Defendants admit the allegations contained in paragraph 17 of the
12 Complaint.

13 18. The Judgment referred to in paragraph 18 of the Complaint speaks for itself, but has
14 since been voided nunc pro tunc.

15 19. The Judgment referred to in paragraph 19 of the Complaint speaks for itself, but has
16 since been voided nunc pro tunc.

17 20. The Judgment referred to in paragraph 20 of the Complaint speaks for itself, but has
18 since been voided nunc pro tunc.

19 21. These answering Defendants respond that the document speaks for itself.

20 22. These answering Defendants admit the allegations contained in paragraph 22 of the
21 Complaint.

22 23. These answering Defendants deny the allegations contained in paragraph 23 of the
23 Complaint.

24 24. These answering Defendants admit the allegations contained in paragraph 24 of the
25 Complaint.

26 25. These answering Defendants admit the allegations contained in paragraph 25 of the
27 Complaint.

28 26. These answering Defendants admit the allegations contained in paragraph 26 of the

1 Complaint.
2 27. The document referred to in paragraph 27 of the Complaint speaks for itself.
3 28. The document referred to in paragraph 28 of the Complaint speaks for itself.
4 29. The document referred to in paragraph 29 of the Complaint speaks for itself.
5 30. These answering Defendants deny the allegations contained in paragraph 30 of the
6 Complaint.
7 31. These answering Defendants admit the allegations contained in paragraph 31 of the
8 Complaint.
9 32. These answering Defendants admit that Plaintiffs improperly filed the Confession.
10 33. These answering Defendants deny the allegations contained in paragraph 33 of the
11 Complaint.
12 34. These answering Defendants deny allegations contained in paragraph 34 of the
13 Complaint.
14 35. These answering Defendants deny the allegations contained in paragraph 35 of the
15 Complaint.
16 36. In response to the allegations contained in paragraph 36 of the Complaint, these
17 answering Defendants incorporates their responses to the proceeding allegations contained in the
18 Complaint as if fully set forth herein.
19 37. These answering Defendants admit the allegations contained in paragraph 37 of the
20 Complaint.
21 38. These answering Defendants deny the allegations contained in paragraph 38 of the
22 Complaint.
23 39. These answering Defendants deny the allegations contained in paragraph 39 of the
24 Complaint.
25 40. These answering Defendants deny the allegations contained in paragraph 40 of the
26 Complaint.
27 41. These answering Defendants deny the allegations contained in paragraph 41 of the
28 Complaint.

1 42. These answering Defendants deny the allegations contained in paragraph 42 of the
2 Complaint.
3 43. These answering Defendants deny the allegations contained in paragraph 43 of the
4 Complaint.
5 44. These answering Defendants deny the allegations contained in paragraph 44 of the
6 Complaint.
7 45. These answering Defendants deny the allegations contained in paragraph 45 of the
8 Complaint.
9 46. These answering Defendants deny the allegations contained in paragraph 46 of the
10 Complaint.
11 47. These answering Defendants deny the allegations contained in paragraph 47 of the
12 Complaint.
13 48. These answering Defendants deny the allegations contained in paragraph 48 of the
14 Complaint.
15 49. These answering Defendants deny the allegations contained in paragraph 49 of the
16 Complaint.
17 50. In response to the allegations contained in paragraph 50 of the Complaint, these
18 answering Defendants incorporates their responses to the proceeding allegations contained in the
19 Complaint as if fully set forth herein.
20 51. These answering Defendants lack sufficient information to admit or deny the
21 allegations contained in paragraph 51 of the Complaint, and based thereon deny the same.
22 52. These answering Defendants deny the allegations contained in paragraph 52 of the
23 Complaint.
24 53. These answering Defendants deny the allegations contained in paragraph 53 of the
25 Complaint.
26 54. These answering Defendants deny the allegations contained in paragraph 54 of the
27 Complaint.
28 55. These answering Defendants deny the allegations contained in paragraph 55 of the

1 Complaint.
2 56. These answering Defendants deny the allegations contained in paragraph 56 of the
3 Complaint.
4 57. These answering Defendants deny the allegations contained in paragraph 57 of the
5 Complaint.
6 58. In response to the allegations contained in paragraph 58 of the Complaint, these
7 answering Defendants incorporates their responses to the proceeding allegations contained in the
8 Complaint as if fully set forth herein.
9 59. These answering Defendants admit that the documents referred to in paragraph 59
10 of the Complaint speak for themselves.
11 60. These answering Defendants deny the allegations contained in paragraph 60 of the
12 Complaint.
13 61. These answering Defendants deny the allegations contained in paragraph 61 of the
14 Complaint.
15 62. These answering Defendants deny the allegations contained in paragraph 62 of the
16 Complaint.
17 63. These answering Defendants deny the allegations contained in paragraph 63 of the
18 Complaint.
19 64. In response to the allegations contained in paragraph 64 of the Complaint, these
20 answering Defendants incorporates their responses to the proceeding allegations contained in the
21 Complaint as if fully set forth herein.
22 65. These answering Defendants deny the allegations contained in paragraph 65 of the
23 Complaint.
24 66. These answering Defendants deny the allegations contained in paragraph 66 of the
25 Complaint.
26 67. These answering Defendants deny the allegations contained in paragraph 67 of the
27 Complaint.
28 68. These answering Defendants deny the allegations contained in paragraph 68 of the

1 Complaint.
2 69. These answering Defendants deny the allegations contained in paragraph 69 of the
3 Complaint.
4 70. These answering Defendants deny the allegations contained in paragraph 70 of the
5 Complaint.
6 71. These answering Defendants deny the allegations contained in paragraph 71 of the
7 Complaint.
8 72. These answering Defendants deny the allegations contained in paragraph 72 of the
9 Complaint.
10 73. In response to the allegations contained in paragraph 73 of the Complaint, these
11 answering Defendants incorporates their responses to the proceeding allegations contained in the
12 Complaint as if fully set forth herein.
13 74. These answering Defendants deny the allegations contained in paragraph 74 of the
14 Complaint.
15 75. These answering Defendants deny the allegations contained in paragraph 75 of the
16 Complaint.
17 76. These answering Defendants deny the allegations contained in paragraph 76 of the
18 Complaint.
19 77. These answering Defendants deny the allegations contained in paragraph 77 of the
20 Complaint.
21 78. These answering Defendants deny the allegations contained in paragraph 78 of the
22 Complaint.
23 79. These answering Defendants deny the allegations contained in paragraph 79 of the
24 Complaint.
25 80. These answering Defendants deny the allegations contained in paragraph 80 of the
26 Complaint.
27 81. These answering Defendants deny the allegations contained in paragraph 81 of the
28 Complaint.

1 82. In response to the allegations contained in paragraph 82 of the Complaint, these
2 answering Defendants incorporate their responses to the proceeding allegations contained in the
3 Complaint as if fully set forth herein.

4 83. These answering Defendants deny the allegations contained in paragraph 83 of the
5 Complaint.

6 84. These answering Defendants deny the allegations contained in paragraph 84 of the
7 Complaint.

8 85. These answering Defendants deny the allegations contained in paragraph 85 of the
9 Complaint.

10 **AFFIRMATIVE DEFENSES**

11 1. Plaintiffs have waived their claims.

12 2. Plaintiffs are estopped from proceeding with their claims.

13 3. Plaintiffs proceeded in bad faith and in violation of their duty to provide Defendants
14 with the benefit of the bargain.

15 4. Plaintiffs have breached their contractual promises.

16 5. To the extent Plaintiffs are attempting to enforce unwritten provisions, the statute of
17 frauds prohibits them from doing so.

18 6. Plaintiffs have been unjustly enriched by virtue of their false assertions and by and
19 through instituting this legal proceeding.

20 7. The Plaintiffs' Complaint is an abuse of process and is being maliciously prosecuted.

21 8. The Plaintiffs, by and through their representatives and partners, were actively
22 negligent.

23 9. The Plaintiffs, by and through their representatives and partners, are comparatively
24 negligent to the extent that Plaintiffs' negligence exceeds the negligence, if any, of these answering
25 Defendants.

26 10. The Plaintiffs have failed and refused to mitigate the damages, if any, they have
27 sustained.

28 11. Laches bars Plaintiffs' claims.

1 12. The Plaintiffs, by and through their manager, representatives and partners, expressly
2 consented to and authorized the conduct of the Defendants now complained of and Plaintiffs are
3 therefore estopped from recovering on their claim.

4 13. The cause of Plaintiffs' damages, if any, is a result of their own inept conduct and in the
5 alternative, is caused by third parties unrelated to the Defendants named herein.

6 14. Plaintiffs' negligent conduct proximately caused whatever damages they have
7 sustained.

8 15. These answering Defendants are entitled to setoff.

9 16. All alleged improper acts allegedly committed by these answering Defendants was
10 accepted, approved and ratified by the Plaintiffs.

11 17. Plaintiffs' Complaint fails to state claims upon which relief can be granted.

12 18. Plaintiffs' claims are barred by the election of remedies.

13 19. Discovery has not yet commenced and these answering Defendants reserve the right to
14 amend this Answer to include additional affirmative defenses as the discovery process proceeds.

15 20. Plaintiff's claims are barred by the applicable statute of limitations.

16 WHEREFORE, Defendants requests judgment in their favor against the Plaintiffs and further
17 requests that said judgment include an award of attorney's fees and Court costs against the Plaintiffs.

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the social security number of any person.

DATED this 29th day of September, 2014.

ROBISON, BELAUSTEGUI, SHARP & LOW
A Professional Corporation
71 Washington Street
Reno, Nevada 89503

/s/ FRANK C. GILMORE
BARRY L. BRESLOW, ESQ.
FRANK C. GILMORE, ESQ.
Attorneys for Attorneys for Defendants Snowshoe
Petroleum, Inc., Superpumper, Inc., Paul Morabito,
individually and as Trustee of the Arcadia Living
Trust, Edward Bayuk, individually and as Trustee of
the Edward William Bayuk Living Trust, and
Salvatore Morabito

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Robison, Belaustegui, Sharp & Low, and that on this date I caused to be served a true copy of the ANSWER TO COMPLAINT OF DEFENDANTS EDWARD BAYUK, INDIVIDUALLY AND AS TRUSTEE OF THE EDWARD WILLIAM BAYUK LIVING TRUST, AND SALVATORE MORABITO all parties to this action by the method(s) indicated below:

X by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

Gerald Gordon, Esq.
John Desmond, Esq.
Brian Irvine, Esq.
Gordon Silver
100 West Liberty Street, Suite 940
Reno, Nevada 89501

X by using the Court's CM/ECF Electronic Notification System addressed to:

Gerald Gordon, Esq.
ggordon@gordonsilver.com

John Desmond, Esq.
jdesmond@gordonsilver.com

Brian Irvine, Esq.
birvine@gordonsilver.com

_____ by personal delivery/hand delivery addressed to:

_____ by facsimile (fax) addressed to:

_____ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 29th day of September, 2014.



2610
GORDON SILVER
GERALD M. GORDON, ESQ.
Nevada Bar No. 229
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JOHN P. DESMOND
Nevada Bar No. 5618
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100 West Liberty Street
Suite 940
Reno, Nevada 89501
Tel: (775) 343-7500
Fax: (775) 786-0131

Attorneys for Plaintiffs

**IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE**

JH, INC., a Nevada corporation; JERRY
HERBST, an individual; and BERRY-
HINCKLEY INDUSTRIES, a Nevada
corporation,

Plaintiffs,

vs.

PAUL MORABITO, individually and as
Trustee of the ARCADIA LIVING TRUST;
SUPERPUMPER, INC., an Arizona
corporation; EDWARD BAYUK,
individually and as Trustee of the EDWARD
WILLIAM BAYUK LIVING TRUST;
SALVATORE MORABITO, and individual;
and SNOWSHOE PETROLEUM, INC., a
New York corporation,

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

**NOTICE OF BANKRUPTCY OF CONSOLIDATED NEVADA CORPORATION
AND PAUL A. MORABITO**

Notice is hereby given that on June 20, 2013, Involuntary Chapter 7 Petitions were filed
against Defendants CONSOLIDATED NEVADA CORPORATION ("CNC") (BK-N-13-51236-
gwz) and PAUL-ANTHONY GEORGES MORABITO ("Morabito") (BK-N-13-51237-gwz).

1 Subsequently, on December 22, 2014, Orders of Relief under Chapter 7 were entered against
2 CNC and Morabito. Therefore these proceedings against those alleged debtors are stayed
3 pursuant to 11 U.S.C. § 362.

4 Notice is also hereby given that the Chapter 7 Trustee for both bankruptcy cases is
5 evaluating whether to pursue this fraudulent transfer action. *See, e.g., In re C.D. Jones & Co.,*
6 *Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (determining “that creditors’ fraudulent
7 transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are
8 property of the estate,” meaning that “the trustee has the right to pursue state law fraudulent
9 transfer claims” (citing *In re Moore*, 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent
10 transfer claims “become estate property once bankruptcy is under way by virtue of the trustee’s
11 successor rights under § 544(b).”)); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla.
12 2007) (“[F]raudulent conveyance claims are property of the estate that with rare exception may
13 only be prosecuted by the trustee” and, accordingly, the trustee may intervene in a previously
14 filed state court action).

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 11th day of February, 2015.

GORDON SILVER

By: /s/ Brian R. Irvine
GERALD M. GORDON, ESQ.
Nevada Bar No. 229
Email: ggordon@gordonsilver.com
JOHN P. DESMOND
Nevada Bar No. 5618
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Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to
NRCp 5(b), I am serving a true and correct copy of the attached **NOTICE OF BANKRUPTCY**
OF CONSOLIDATED NEVADA CORPORATION AND PAUL A. MORABITO on the
parties as set forth below:

- ☐ Placing an original or true copy thereof in a sealed envelope placed for collection
and mailing in the United States Mail, Reno, Nevada, postage prepaid, following
ordinary business practices
- ☐ Certified Mail, Return Receipt Requested
- ☐ Via Facsimile (Fax)
- ☐ Via E-Mail
- ☐ Placing an original or true copy thereof in a sealed envelope and causing the same
to be personally Hand Delivered
- ☐ Federal Express (or other overnight delivery)
- ☒ Via CM/ECF

addressed as follows:
Barry Breslow
Frank Gilmore
ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, NV 89503

DATED this 11th day of February, 2015.

/s/ Stephanie J. Glantz
An Employee of GORDON SILVER

1 **4105**
2 GORDON SILVER
3 GERALD M. GORDON, ESQ.
4 Nevada Bar No. 229
5 Email: ggordon@gordonsilver.com
6 JOHN P. DESMOND
7 Nevada Bar No. 5618
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15 Tel: (775) 343-7500
16 Fax: (775) 786-0131

17 *Attorneys for Plaintiffs*

18 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
19 **THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE**

20 JH, INC., a Nevada corporation; JERRY
21 HERBST, an individual; and BERRY-
22 HINCKLEY INDUSTRIES, a Nevada
23 corporation,

24 Plaintiffs,

25 vs.

26 PAUL MORABITO, individually and as
27 Trustee of the ARCADIA LIVING TRUST;
28 SUPERPUMPER, INC., an Arizona
corporation; EDWARD BAYUK,
individually and as Trustee of the EDWARD
WILLIAM BAYUK LIVING TRUST;
SALVATORE MORABITO, and individual;
and SNOWSHOE PETROLEUM, INC., a
New York corporation,

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

SUPPLEMENTAL NOTICE OF BANKRUPTCY OF CONSOLIDATED NEVADA
CORPORATION AND PAUL A. MORABITO

On February 11, 2015, a Notice of Bankruptcy was filed in the above-captioned case.
Attached hereto as **Exhibit 1** and **Exhibit 2** are the Involuntary Petitions for Case Nos. BK-N-
13-51236 and BK-N-13-51237-gwz, respectively. Attached hereto as **Exhibit 3** and **Exhibit 4**

1 are the Orders For Relief Under Chapter 7 for Case Nos. BK-N-13-51236 and BK-N-13-51237-
2 gwz, respectively.

3
4 **AFFIRMATION**
5 **Pursuant to NRS 239B.030**

6 The undersigned does hereby affirm that the preceding document does not contain the
7 social security number of any person.

8 DATED this 17th day of February, 2015.

9 GORDON SILVER

10
11 By: /s/ Brian R. Irvine
12 GERALD M. GORDON, ESQ.
13 Nevada Bar No. 229
14 Email: ggordon@gordonsilver.com
15 JOHN P. DESMOND
16 Nevada Bar No. 5618
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19 Nevada Bar No. 7758
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26 *Attorneys for Plaintiffs*

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CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to
NRCF 5(b), I am serving a true and correct copy of the attached **SUPPLEMENTAL NOTICE**
OF BANKRUPTCY OF CONSOLIDATED NEVADA CORPORATION AND PAUL A.
MORABITO on the parties as set forth below:

- ☐ Placing an original or true copy thereof in a sealed envelope placed for collection
and mailing in the United States Mail, Reno, Nevada, postage prepaid, following
ordinary business practices
- ☐ Certified Mail, Return Receipt Requested
- ☐ Via Facsimile (Fax)
- ☐ Via E-Mail
- ☐ Placing an original or true copy thereof in a sealed envelope and causing the same
to be personally Hand Delivered
- ☐ Federal Express (or other overnight delivery)
- ☒ Via CM/ECF

addressed as follows:
Barry Breslow
Frank Gilmore
ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, NV 89503

DATED this 17th day of February, 2015.

/s/ Stephanie J. Glantz
An Employee of GORDON SILVER

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EXHIBIT TABLE

Exhibit	Description	Pages¹
1	Involuntary Petition for Case No. BK-N-13-51236	31
2	Involuntary Petition for Case No. BK-N-13-51237	31
3	Order For Relief Under Chapter 7 for Case No. BK-N-13-51236	3
4	Order For Relief Under Chapter 7 for Case No. BK-N-13-51237	3

¹ Exhibit page counts are exclusive of exhibit slip sheets.

EXHIBIT 1


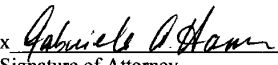
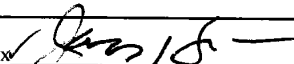
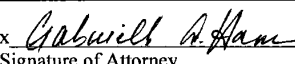
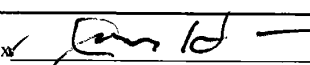
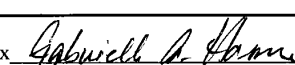
EXHIBIT 1

504

B 5 (Official Form 5) (12/07) - Page 2

Name of Debtor Consolidated Nevada Corporation

Case No. _____

TRANSFER OF CLAIM		
<input type="checkbox"/> Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).		
REQUEST FOR RELIEF		
Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.		
Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.		
<div style="display: flex; justify-content: space-between;"> <div style="width: 80%;"> <p><input checked="" type="checkbox"/> </p> <p>Signature of Petitioner or Representative (State title) <u>JH, Inc.</u></p> <p>Name of Petitioner _____</p> <p>Date Signed <u>6/20/2013</u></p> <p>Name & Mailing Address of Individual Signing in Representative Capacity</p> <p style="text-align: right;"><u>Jerry Herbst</u> <u>5195 Las Vegas Blvd. So.</u> <u>Las Vegas, NV 89119</u></p> </div> <div style="width: 10%; text-align: center;"> <p><u>6/20/2013</u></p> </div> </div>	<div style="display: flex; justify-content: space-between;"> <div style="width: 80%;"> <p><input checked="" type="checkbox"/> </p> <p>Signature of Attorney <u>Gabrielle A. Hamm, Esq, Gordon Silver</u></p> <p>Name of Attorney Firm (If any) <u>3960 Howard Hughes Pkwy 9th Floor, Las Vegas, NV 89169</u></p> <p>Address <u>(702) 796-5555</u></p> <p>Telephone No. _____</p> </div> <div style="width: 10%; text-align: center;"> <p><u>6/20/2013</u></p> </div> </div>	
<div style="display: flex; justify-content: space-between;"> <div style="width: 80%;"> <p><input checked="" type="checkbox"/> </p> <p>Signature of Petitioner or Representative (State title) <u>Jerry Herbst</u></p> <p>Name of Petitioner _____</p> <p>Date Signed <u>6/20/2013</u></p> <p>Name & Mailing Address of Individual Signing in Representative Capacity</p> <p style="text-align: right;"><u>Jerry Herbst</u> <u>5195 Las Vegas Blvd. So.</u> <u>Las Vegas, NV 89119</u></p> </div> <div style="width: 10%; text-align: center;"> <p><u>6/20/2013</u></p> </div> </div>	<div style="display: flex; justify-content: space-between;"> <div style="width: 80%;"> <p><input checked="" type="checkbox"/> </p> <p>Signature of Attorney <u>Gabrielle A. Hamm, Esq, Gordon Silver</u></p> <p>Name of Attorney Firm (If any) <u>3960 Howard Hughes Pkwy 9th Floor, Las Vegas, NV</u></p> <p>Address <u>(702) 796-5555</u></p> <p>Telephone No. _____</p> </div> <div style="width: 10%; text-align: center;"> <p><u>6/20/2013</u></p> </div> </div>	
<div style="display: flex; justify-content: space-between;"> <div style="width: 80%;"> <p><input checked="" type="checkbox"/> </p> <p>Signature of Petitioner or Representative (State title) <u>Berry-Hinckley Industries</u></p> <p>Name of Petitioner _____</p> <p>Date Signed <u>6/20/2013</u></p> <p>Name & Mailing Address of Individual Signing in Representative Capacity</p> <p style="text-align: right;"><u>Jerry Herbst</u> <u>5195 Las Vegas Blvd. So.</u> <u>Las Vegas, NV 89119</u></p> </div> <div style="width: 10%; text-align: center;"> <p><u>6/20/2013</u></p> </div> </div>	<div style="display: flex; justify-content: space-between;"> <div style="width: 80%;"> <p><input checked="" type="checkbox"/> </p> <p>Signature of Attorney <u>Gabrielle A. Hamm, Esq, Gordon Silver</u></p> <p>Name of Attorney Firm (If any) <u>3960 Howard Hughes Pkwy 9th Floor, Las Vegas, NV</u></p> <p>Address <u>(702) 796-5555</u></p> <p>Telephone No. _____</p> </div> <div style="width: 10%; text-align: center;"> <p><u>6/20/2013</u></p> </div> </div>	
PETITIONING CREDITORS		
Name and Address of Petitioner	Nature of Claim	Amount of Claim
<u>JH, Inc., 5195 Las Vegas Blvd. So. Las Vegas, NV 89119</u>	<u>See Attachment</u>	<u>77,000,000.00</u>
Name and Address of Petitioner	Nature of Claim	Amount of Claim
<u>Jerry Herbst, 5195 Las Vegas Blvd. So. Las Vegas, NV 89119</u>	<u>See Attachment</u>	<u>77,000,000.00</u>
Name and Address of Petitioner	Nature of Claim	Amount of Claim
<u>Berry-Hinckley Industries, 5195 Las Vegas Blvd. So. Las Vegas, NV 89119</u>	<u>See Attachment</u>	<u>77,000,000.00</u>
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims <u>77,000,000.00</u>

29 continuation sheets attached

Attachment to Involuntary Petition

JH, Inc., a Nevada corporation ("JH"), and P.A. MORABITO & CO. Ltd. ("PAMCO"), the predecessor-in-interest to Consolidated Nevada Corporation, a Nevada corporation ("CNC"), entered into an Amended and Restated Stock Purchase Agreement dated June 28, 2007 (the "ARSPA"), whereby JH was to purchase the stock of Berry-Hinckley Industries ("BHI") from PAMCO. Jerry Herbst ("Herbst," and collectively with JH and BHI, the "Herbst Parties") was the guarantor of the JH obligations under the ARSPA, and Paul A. Morabito ("Morabito," and together with CNC, the "Morabito Parties" or "Debtors") guaranteed the obligations of PAMCO.

A dispute developed between the Morabito Parties and the Herbst Parties (together, the "Parties") regarding the sale of the BHI stock to JH. The Morabito Parties filed a lawsuit against the Herbst Parties on December 3, 2007. The lawsuit was captioned *Consolidated Nevada Corp., et al. v. JH. et al.*, and was filed in Department 6 of the Second Judicial District Court in and for the County of Washoe (the "State Court"), Case No. CV07-02764 (together with all claims and counterclaims, the "State Court Action"). The Herbst Parties filed numerous counterclaims in the State Court Action against the Morabito Parties, including, but not limited to, fraud in the inducement, misrepresentation and breach of contract.

The State Court ultimately awarded the Herbst Parties total damages in the amount of \$149,444,777.80, representing both compensatory and punitive damages (the "State Court Judgment"). The State Court Judgment was entered by the Court on August 23, 2011. On October 12, 2010, the Court entered its findings of fact and conclusions of law related to the State Court Judgment (the "Findings of Fact and Conclusions of Law"). The Findings of Fact and Conclusions of Law outlined the factual and legal basis for the State Court Judgment.

While the Morabito Parties' appeal of the State Court Judgment (the "Appeal") was pending, the Parties entered into that certain Settlement Agreement and Mutual Release dated November 30, 2011 (the "Settlement Agreement"). Under the terms of the Settlement Agreement, the Parties agreed to file a Stipulation to Vacate Appeal and a Stipulation to Vacate Judgment and Findings of Fact and Conclusions of Law entered by the State Court. Such documents were executed and filed, and the State Court Action was dismissed with prejudice.

The Settlement Agreement further required the Morabito Parties to execute a Confession of Judgment and a Stipulation to Confession of Judgment in the amount of \$85,000,000 (referred to collectively as the "Confessed Judgment"). The Settlement Agreement provided that, upon breach of the Settlement Agreement and failure to cure, the Herbst Parties could file, *ex parte* and without notice, the Confessed Judgment in Department 6 of the Second Judicial District Court in and for the County of Washoe.

The Morabito Parties are in Default under the terms of the Settlement Agreement by reason of the following:

(i) Failure on the part of the Morabito Parties to timely comply with the terms of the Moreno settlement agreement related to the Moreno Lawsuit (the "Moreno Default");

(ii) Failure on the part of the Morabito Parties to timely pay amounts due and owing pursuant to the Lease for 425 Maestro resulting in a default under the Lease (the "Lease Default");

(iii) Failure on the part of the Morabito Parties to timely pay amounts due and owing pursuant to the Hinckley Note resulting in a default under the Hinckley Note (the “Hinckley Note Default”); and

(iv) Failure on the part of the Morabito Parties to pay to the Herbst Parties the cash payment of Four Million and No/100ths Dollars (\$4,000,000.00) due on or before March 1, 2013 (the “Cash Payment Default,” together with the Moreno Default and the Hinckley Note Default, the “Continuing Defaults”).

Thereafter, the Morabito Parties requested that the Herbst Parties forbear from exercising their rights and remedies under the Settlement Agreement with respect to the Continuing Defaults until December 1, 2013. Accordingly, the Parties entered into that certain Forbearance Agreement dated March 1, 2013. Pursuant to the Forbearance Agreement, the Morabito Parties made the following acknowledgments:

(i) the Continuing Defaults have occurred and are continuing; (ii) the Morabito Parties are unable to cure the Cash Payment Default; (iii) the Morabito Parties are unable to cure the Hinckley Note Default; (iv) pursuant to the terms of the Settlement Agreement, as a result of the occurrence of the Continuing Defaults, BHI and the Herbst Parties currently have the right to immediately exercise any one or more of the rights and remedies under the Settlement Agreement, at law or in equity, as they, in their sole discretion, deem necessary or desirable; and (v) the Morabito Parties do not have any defenses, legal or equitable, to the Continuing Defaults, and/or any other events of Default that may exist under the Settlement Agreement or the exercise by [the Herbst Parties] of any one or more of their rights and remedies under the Settlement Agreement.

Forbearance Agreement, ¶ 3.

In consideration of the covenants and agreements contained in the Forbearance Agreement, including the Herbst Parties’ agreement to grant the forbearance, the Morabito Parties agreed to, *inter alia*, provide the Herbst Parties no later than March 15, 2013, a fully executed forbearance agreement between the Morabito Parties and the holders of the Hinckley Note (the “Hinckley Forbearance Agreement”), and make certain payments of deferred principal on the payment due on March 1, 2013 under the Settlement Agreement, as follows:

April 30, 2013	\$ 62,500
May 15, 2013	\$ 62,500
June 15, 2013	\$125,000
July 15, 2013	\$125,000
August 15, 2013	\$125,000
September 15, 2013	\$125,000
October 15, 2013	\$125,000
November 15, 2013	\$125,000

See Forbearance Agreement, ¶ 6.

In addition, the Morabito Parties were required to make certain additional payments to the Herbst Parties commencing with a payment of \$68,437 on or before May 21, 2013. Id. at ¶ 6(g).

Moreover, the Forbearance Agreement provided that if the Morabito Parties failed to deliver the Hinckley Forbearance Agreement, the Herbst Parties would be entitled to “deem [the Forbearance] Agreement null and void ab initio, and may proceed to enforce any rights or remedies available to [] the Herbst Parties in the Settlement Agreement or by law.” Forbearance Agreement, ¶ 6(c).

Finally, the Forbearance Agreement provided that in the event of a default under the terms of the Forbearance Agreement or the Settlement Agreement, other than the Continuing Defaults, that “the Herbst Parties may immediately, and without expiration of any notice and cure period, exercise and enforce their rights and remedies under the Settlement Agreement or at law.” Forbearance Agreement, ¶ 8.

The Morabito Parties failed to comply with the Forbearance Agreement by failing to pay the Herbst Parties \$62,500 due by April 30, 2013, \$62,500 due by May 15, 2013, \$68,437 due by May 21, 2013 and \$125,000 due by June 15, 2013. In addition, the Morabito Parties failed to obtain or deliver the Hinckley Forbearance Agreement.

Pursuant to the Forbearance Agreement, the Morabito Parties recognized that they were in default under the Settlement Agreement, and that such defaults were of a continuing nature. As such, the Herbst Parties were not required to provide the Morabito Parties with any notice prior to filing and entering the Confession of Judgment with the Court, or exercising any other available remedies under the Settlement Agreement. In accordance therewith, the Herbst Parties filed the Confessed Judgment, consisting of the Confession of Judgment and the Stipulation to Confession of Judgment, on June 18, 2013 in the matter of *Consolidated Nevada Corp., et al. v. JH. et al.*, Case No. CV07-02764. A true and correct copy of the Confessed Judgment is attached hereto as Exhibit “A.”

Pursuant to the Confessed Judgment, the Morabito Parties are jointly and severally indebted to the Herbst Parties in the amount of \$85,000,000.00, less any credits or offsets for any payments made under the Settlement Agreement. Such debt is not contingent as to liability or subject to a bona fide dispute as to liability or amount. Such claims were not acquired for the purpose of commencing this case, and the Herbst Parties have not transferred any claims included herein.

The Confession of Judgment establishes fraud in the inducement and is non-dischargeable under 11 U.S.C. § 523. See Confession of Judgment, ¶¶ 48-54, 66-75. Further, the Morabito Parties have stipulated to the non-dischargeability of the judgment. See Stipulation to Confession of Judgment.

EXHIBIT A

EXHIBIT A

FILED

Electronically

06-18-2013:02:03:46 PM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3796507

1 GORDON SILVER
 JOHN P. DESMOND
 2 Nevada Bar No. 5618
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 3 BRIAN R. IRVINE
 Nevada Bar No. 7758
 4 Email: birvine@gordonsilver.com
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 5 Suite 940
 Reno, NV 89501
 6 Tel: (775) 343-7500
 Fax: (775) 786-0131

7 *Attorneys for Defendants/Counter-Claimants*
 8

9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

10 **IN AND FOR THE COUNTY OF WASHOE**

11 CONSOLIDATED NEVADA CORP., et al.,)	CASE NO. CV07-02764
12 Plaintiffs,)	
13 vs.)	DEPT. NO. 6
14 JH, INC., et al.,)	
15 Defendants.)	
16 _____)	
17 JH, INC., et al.,)	
18 Counter-Claimants,)	
19 vs.)	
20 CONSOLIDATED NEVADA CORP., et al.,)	
21 Counter-Defendants.)	
22 _____)	

23 **CONFESSION OF JUDGMENT**

24 Defendants/Counter-Claimants JH, INC., JERRY HERBST, and BERRY-HINCKLEY
 25 INDUSTRIES, by and through their counsel of record, Gordon Silver, file the attached
 26 Confession of Judgment, **Exhibit 1** hereto, against Plaintiff/Counter-Defendants,
 27 CONSOLIDATED NEVADA CORPORATION, and PAUL A. MORABITO.

28 ///

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 18th day of June, 2013.

GORDON SILVER

/s/ John P. Desmond
JOHN P. DESMOND
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Attorneys for Defendants/Counter-Claimants

EXHIBIT TABLE

Exhibit	Description	Pages¹
1	Confession of Judgment	20

¹ Exhibit page count is exclusive of exhibit slip sheet.

CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to NRCP 5(b), I am serving the attached **CONFESSION OF JUDGMENT** on the party set forth below by:

X	Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail at Reno, Nevada, postage prepaid, following ordinary business practices
	Certified Mail, Return Receipt Requested
	Via Facsimile (Fax)
	Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand-Delivered
	Federal Express (or other overnight delivery)
	Hand Delivery
X	Via E-Mail

addressed as follows:

Barry L. Breslow
Robison, Belaustegui, Sharp and Low
71 Washington Street
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Dennis C. Vacco
Lippes Mathias Wexler Friedman LLP
665 Main Street, Suite 300
Buffalo, New York 14203
dvacco@lippes.com

DATED this 18th day of June, 2013.

/s/ Cindy S. Grinstead
An Employee of GORDON SILVER

FILED

Electronically

06-18-2013:02:03:46 PM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3796507

EXHIBIT 1

EXHIBIT 1

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7 *Attorneys for JH, Inc., Jerry Herbst,*
8 *And Berry-Hinckley Industries*

9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10 IN AND FOR THE COUNTY OF WASHOE

11 JH, INC., a Nevada corporation; JERRY HERBST, CASE NO.:
12 an individual; and BERRY-HINCKLEY
INDUSTRIES, a Nevada corporation, DEPT. NO.:

13 Plaintiffs,

14 vs.

15 CONSOLIDATED NEVADA CORPORATION, a
16 Nevada corporation; PAUL A. MORABITO, an
individual,

17 Defendants.
18

19 CONFESSION OF JUDGMENT

20 RECITALS:

21 A. JH, and P.A. MORABITO & CO. LTD., a Nevada corporation ("PAMCO") entered
22 into that certain Amended and Restated Stock Purchase Agreement dated June 28, 2007 (the
23 "ARSPA"), whereby JH was to purchase the stock of BHI from PAMCO. Herbst was the guarantor
24 of the JH obligations under the ARSPA, and Morabito guaranteed the obligations of PAMCO.
25 CNC is the successor in interest to PAMCO. The transaction contemplated by the ARSPA closed
26 on July 2, 2007.
27
28

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1 B. A dispute developed between the Morabito Parties and the Herbst Parties regarding
2 the sale of the BHI stock to JH. Based thereon, the Morabito Parties filed a lawsuit against the
3 Herbst Parties on December 3, 2007. The lawsuit was captioned Consolidated Nevada Corp., et al.
4 v. JH, et al., and was filed in Department 6 of the Second Judicial District Court in and for the
5 County of Washoe (the "Court"), Case No. CV07-02764 (together with all claims and
6 counterclaims, the "Action").

7
8 C. The Herbst Parties filed numerous counterclaims in the Action against the Morabito
9 Parties, including, but not limited to, fraud in the inducement, misrepresentation and breach of
10 contract.

11
12 D. The matter was tried before the Honorable Judge Brent Adams by way of a bench
13 trial commencing May 10, 2010 that lasted for several weeks. At the conclusion of the bench trial,
14 the Court found that the Morabito Parties had breached the ARSPA and committed fraud in the
15 inducement and misrepresentation in relation to numerous aspects of the transaction contemplated
16 by the ARSPA. The Court ultimately awarded the Herbst Parties total damages in the amount of
17 One Hundred Forty-Nine Million Four Hundred Forty-Four Thousand Seven Hundred Seventy-
18 Seven and 80/100ths Dollars (\$149,444,777.80), representing both compensatory and punitive
19 damages (the "Judgment"). The Judgment was entered by the Court on August 23, 2011.

20
21 E. On October 12, 2010, the Court entered its findings of fact and conclusions or law
22 related to the Judgment (the "Findings of Fact and Conclusions of Law"). The Findings of Fact and
23 Conclusions of Law outlined the factual and legal basis for the Judgment.

24
25 F. The Morabito Parties appealed the Findings of Fact and Conclusions of Law as well
26 as the Judgment to the Nevada Supreme Court as identified by those certain appeals captioned
27 Nevada Supreme Court Case Nos. 54412 and 57943. The Herbst Parties filed numerous cross-
28

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1 appeals in the subject appeals. The appeals filed by the Morabito Parties and the cross appeals filed
 2 therein by the Herbst Parties, are collectively referred to herein as the "Appeal."

3 G. The Morabito Parties have represented that they are unable to satisfy the monetary
 4 Judgment entered against them in full.

5 H. The Parties agreed to settle the Action, and, on November 30, 2011 executed the
 6 Settlement Agreement and Mutual Release ("Settlement").

7 I. As part of the Settlement, the Parties agreed that the Appeals would be vacated as
 8 well as the Judgment and the Findings of Fact and Conclusions of Law.

9 J. As part of the Settlement, Consolidated Nevada Corporation ("CNC") and Morabito
 10 agree to make the following cash payments to JH, Inc. in addition to other cash payments and
 11 assumption of liabilities as referenced in the Settlement.

- 12 ○ December 1, 2011 - \$2.5 million
- 13 ○ June 1, 2012 - \$2.5 million
- 14 ○ March 1, 2013 - \$4 million
- 15 ○ December 1, 2013 - \$4 million

16 K. As part of the Settlement, beginning on December 1, 2011, CNC and Paul Morabito
 17 agreed to assume any and all obligations of the tenant under the lease for 425 Maestro Drive, Reno,
 18 Nevada, including but not limited to all rental payments, CAM charges, taxes, etc. CNC and Paul
 19 Morabito agreed to provide proof of each payment under the lease for 425 Maestro Drive, Reno,
 20 Nevada (and performance of any and all other non-monetary obligations) to JH, Inc. within five (5)
 21 days of each payment. CNC and Paul Morabito will indemnify and hold harmless JH, Inc. and Jerry
 22 Herbst for any and all claims related to obligations owed under the lease for 425 Maestro Drive,
 23 Reno, Nevada beginning on December 1, 2011 until the conclusion of the lease term.

24 L. As part of the Settlement, beginning on December 1, 2011, CNC and Paul Morabito
 25 agreed to assume any and all obligations of the Maker/Payor under the June 29, 2007 Note between
 26

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JH, Inc. as Maker and Payor and Arthur T. Hinckley, as Payee, including but not limited to those obligations set forth in Sections 1.1 through 1.3 of the Note, periodic interest payments and payment of the principal and accrued interest upon maturation. CNC and Paul Morabito agreed to provide proof of each payment under the Note between JH and Mr. Hinckley (and performance of any and all other non-monetary obligations) to JH, Inc. and Jerry Herbst for any and all claims related to the June 29, 2007 Note between JH, Inc. as Maker and Payor and Jerry Herbst as guarantor and Arthur T. Hinckley, as Payee.

M. As part of the Settlement, beginning on December 1, 2011, CNC and Paul Morabito agreed to indemnify and defend Berry-Hinckley Industries and Jerry Herbst in the lawsuit captioned as Desi Moreno, Trustee of the Desi Moreno 2001 Trust, et al. v. Berry-Hinckley Industries, et al., Case No. CV10-02329 in Department 4 of the Second Judicial District Court in and for the County of Washoe. CNC and Paul Morabito expressly agreed to indemnify Berry-Hinckley Industries and Jerry Herbst from any finding of liability or assessment of damages in that action. To facilitate the assumption of the duty to defend and indemnify in the context of the aforementioned case, CNC and Paul Morabito agreed to amend the Answer previously filed. It was agreed that the Amended Answer would admit liability to JH, Inc. pursuant to the indemnification provisions of the Amended and Restated Stock Purchase Agreement. Specifically, pursuant to Article 9.1(d) of the ARSPA, CNC and Paul Morabito agreed to admit that they were obligated to indemnify Berry-Hinckley Industries and Jerry Herbst for any loss that has already been suffered and any loss that may be suffered in the future as a result of the lawsuit filed by the Moreno Plaintiffs. It was agreed that failure to timely indemnify Berry-Hinckley Industries and Jerry Herbst from a findings of liability or damages would constitute a default under the settlement agreement. It was also agreed that in the event a judgment is entered against Berry-Hinckley Industries and/or Jerry Herbst, Paul Morabito and CNC agreed to either (1) satisfy said judgment within fifteen days; or (2) file a notice of appeal

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1 of said judgment within thirty days and post a bond pending appeal to stay execution against Berry-
 2 Hinckley Industries and/or Jerry Herbst. In the event of an appeal, if the decision is affirmed, Paul
 3 Morabito and CNC agreed to pay any judgment within fifteen days of an order of affirmance from
 4 the Nevada Supreme Court.

5 N. Paul Morabito, individually and as trustee of the Arcadia Living Trust, agreed that
 6 the real property located at 8355 Panorama Drive in Reno, Nevada currently held in the name of the
 7 Arcadia Living Trust would be listed for sale as soon as possible. The initial listing price was to be
 8 set as follows:
 9

10 • JH, Inc. and Jerry Herbst, on the one hand, and CNC and Paul Morabito, on
 11 the other hand, would each commission an appraiser of their choice that is licensed in the
 12 State of Nevada with at least five (5) years experience appraising residential real property in
 13 Northern Nevada.
 14

15 • Each appraiser would prepare a sale appraisal of the Panorama Drive
 16 property. The party requesting the appraisal would bear the expense of the same.
 17

18 • The initial listing price would be the mid-point, to the nearest thousand
 19 dollars, between the two appraisals. The listing price must be a minimum of \$2.5 million.
 20 Paul Morabito, individually and as trustee of the Arcadia Living Trust, represented and
 21 warranted that there is an existing mortgage on the real property located at 8355 Panorama
 22 Drive with a remaining pay-off amount of approximately \$1 million. Mr. Morabito
 23 represented and warranted, to the best of his personal knowledge, that there are no other
 24 mortgages or liens on the Panorama Drive property.
 25

26 • Paul Morabito, individually and as trustee of the Arcadia Living Trust, agreed
 27 that, upon the sale of the real property located at 8355 Panorama Drive, JH, Inc. and Jerry
 28 Herbst would receive the net proceeds of that sale, after closing costs and the existing \$1

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million mortgage are paid. Should JH, Inc. and Jerry Herbst receive more than \$1 million in net proceeds from that sale, CNC and Paul Morabito would be entitled to deduct any amount received by JH, Inc. and Jerry Herbst in excess of \$1 million from the \$4 million payment scheduled to be made under this settlement agreement on December 1, 2013.

- If the real property located at 8355 Panorama Drive, Reno, Nevada did not sell within six (6) months of the first listing date, representatives of each of the parties agreed to meet with the listing agent to determine if any actions should be taken to enable the property to be sold.

O. As part of the Settlement, CNC and Morabito agreed to execute this Confession of Judgment and stipulate that it is non-dischargeable in any bankruptcy proceeding filed by either CNC or Paul Morabito, in the amount of \$85 million. The Confession of Judgment may be filed, ex parte and with no notice to CNC or Paul Morabito, should CNC or Paul Morabito fail to perform or default on any of their obligations under the Settlement, and said failure to perform is not cured within fifteen (15) days. In the event all payments are made and obligations performed under the Settlement by CNC and Paul Morabito, this Confession of Judgment will be returned to CNC and Paul Morabito once all payments have been made and obligations performed.

P. In the event this Confession of Judgment is filed following an event of default which is not cured within fifteen (15) days, CNC and Paul Morabito agree not to defend or contest the filing of the Confession of Judgment.

NOW THEREFORE, CONSOLIDATED NEVADA CORPORATION, a Nevada corporation ("CNC"), and PAUL MORABITO, individually ("Morabito") hereby consent, stipulate and agree to the entry of judgment as follows:

1. The above Recitals A through P above, are hereby incorporated by reference entirely herein and expressly consented, stipulated and agreed to by CNC and Morabito.

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2. Berry-Hinckley Industries ("BHI") began operations in 1928 when Wayne Hinckley and Lawrence Semenza assumed the lease of the Flying A Service Station on Second and West Streets in Reno, Nevada.

3. In the late 1970s, Art Hinckley, Ward Hinckley's son, joined the business supervising the administrative staff of three employees.

4. BHI was very successful for generations.

5. The Stock of BHI was purchased on October 14, 2005, by P.A. Morabito & Co. ("PAMCO"), a company owned by Mr. Morabito, for approximately \$95 million

6. Paul Morabito, the controlling owner of PAMCO, was appointed president and CEO.

7. All real properties owned by BHI, and by related entities as operated by BHI, were separately sold to PAMCO, which properties were then sold to third parties.

8. As part of these sales, new leases were entered into with BHI as the lessee and the leases were at above-market rates.

9. JH, owned by Jerry Herbst, was formed for the purpose of acquiring BHI.

10. JH is a related party to Terrible Herbst, Inc. and to the Herbst family, who have decades of experience operating gas stations and convenience stores and, in recent years, some experience in the gaming industry.

11. By no later than December 31, 2008, BHI had zero value.

12. The ARSPA consists of two components.

13. First, the transaction consisted of the Development Sites. The Development Sites are ten parcels of real property that were partially improved or would be improved to create convenience stores and gas stations.

14. The primary assets in the second category were the operating convenience stores and gas stations.

15. Section 2.8(c) of the ARSPA obligates the seller to enter into a construction management agreement with the buyer and that agreement is attached as Exhibit E to the ARSPA.

16. The Construction Management Agreement ("CMA") provides that, in consideration for the purchase of the Development Sites by owner, the construction manager, which is Washoe

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1 Construction Management Services, LLC ("WCM"), a company created and owned by Mr.
 2 Morabito, has agreed to act as the construction manager for the project.

3 17. Mr. Morabito's company agreed to act as construction manager for this project in
 4 consideration for the purchase of the Development Sites by JH.

5 18. A few pertinent provisions of the CMA are as follows:

6 a. Article 1 provides, "[t]he Construction Manager will assist the Owner with
 7 the management of the Project, including monitoring Project costs, endeavoring to keep costs within
 8 the fixed sum contracts entered into by and between Owner and Dennis Banks Construction (the
 9 "Contractor") for certain of the Development Sites and within the budgets developed by Owner and
 10 the Construction Manager for the balance of the Development Sites for which the Owner will have
 11 entered into Cost, Plus Contracts with the Contractor, . . . and working with the Contractor to
 12 schedule the work of the Project efficiently so that the Project will be ready for occupancy on the
 13 dates set forth in the Construction Contracts."

14 b. Article 2.1 provides, "[t]he Construction Manager will review all plans and
 15 specifications and advise on systems and materials, construction feasibility, time requirements for
 16 procurement, installation and construction, relative costs, and provide recommendations for
 17 economies as appropriate. The Construction Manager is hereby authorized to act as the Owner's
 18 agent in dealing with the Architect, the Construction Contracts, subcontractors and their respective
 19 employees and agents."

20 c. Paragraph 2.3 provides, in part, "[t]he Construction Manager will work with
 21 the Contractor to assure completion of the Project within the time periods set forth in the
 22 Construction Contracts.. In the event any change order or other adjustment is requested by Owner
 23 to be made to any Construction Contract, Construction manager will work with the Contractor to
 24 assure proper inclusion of such change order or other adjustment into the Project. "

25 19. Pursuant to paragraph 3.2, the relevant terms and conditions of the ARSPA are
 26 incorporated in the CMA.

27 20. The role of the construction manager is to be the owner's representative to ensure that
 28 both the schedule of the construction project and its costs adhere to the budget and timeline for

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1 construction. The construction manager asks questions and looks at the long-term items of a
 2 contract. The construction manager works directly with subcontractors, taking bids, evaluating the
 3 costs of various components of the construction, creating a construction timeline, and making, at a
 4 minimum, monthly reports to the owner so the owner is advised consistently of the milestones of
 5 construction. A good construction manager facilitates the process and ensures proper and
 6 responsible accounting of the owner's money on the project.

7 21. The construction manager is usually involved in the construction on a daily basis and
 8 frequently visits the construction site. A construction manager should review the construction
 9 schedule with the contractor and meet with the contractor on a weekly basis.

10 22. WCM and Mr. Morabito performed none of the services contemplated by the CMA.

11 23. Mr. Morabito made it absolutely plain that in his view, the only purpose of the CMA
 12 was for him to get paid. Mr. Morabito actually said, "What does the management of the
 13 construction sites mean? I have no idea what that means."

14 24. Garrett Gordon is an attorney with the law firm of Lewis and Roca in Reno, Nevada.
 15 Mr. Gordon made it extremely plain that he does not have any competence in construction
 16 supervision. Mr. Gordon testified that he was called every day by Mr. Morabito, who wanted to
 17 know the status of the building permits so that Mr. Morabito could get his money. Mr. Gordon's job
 18 was to secure Mr. Morabito's money by getting building permits or certificates of occupancy.

19 25. Phillip Tripoli has no capacity to, or did not in any significant way, supervise this
 20 project. Mr. Tripoli did not communicate at all with the owner of the project.

21 26. Mr. Morabito was not managing the construction project, he was managing his
 22 money.

23 27. The ARSPA required PAMCO to provide a working capital estimate prior to closing,
 24 which it did. There was no basis whatsoever for the contents of the working capital estimate. Mr.
 25 Morabito decided to simply create it.

26 28. There is not one piece of paper that can be produced to support the exaggerated value
 27 of the company as set forth in the working capital estimate.

28

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1 29. The major difference between Mr. Morabito's estimate and the actual working capital
2 is accounts payable. This fact is significant.

3 30. Mr. Morabito did not prepare the monthly financial statements.

4 31. There is no evidence that the monthly financial statements were inaccurate.

5 32. Mr. Morabito did not have access to the accounting system of the company.

6 33. Paula Meyer, then CFO of BHI, gave Mr. Morabito evidence to understand that the
7 leases were not being flipped as was being represented to JH.

8 34. In the course of events leading to the closing of this transaction, there was a point
9 where Mr. Morabito only wanted Ms. Meyer to communicate with him and not the lawyers or BCC
10 Capital who was representing Mr. Morabito and CNC in the transaction. This is a complex
11 transaction involving tens of millions of dollars. As the CFO, Ms. Meyer had access to the financial
12 statements of the company while the CEO of the company, Mr. Morabito, did not have access.
13 Nevertheless, Ms. Meyer was told to only communicate with Mr. Morabito.

14 35. Ms. Meyer constantly had disagreements with Mr. Morabito about the amount of
15 accounts payable.

16 36. The accounts payable were in the range of at least five to six million, but Mr.
17 Morabito represented to JH that the accounts payable amount was much lower than that.

18 37. Stan Bernstein, Mr. Morabito's personal accountant, agreed with Ms. Meyer
19 regarding accounts payable.

20 38. Karen Scarborough, BHI Controller, also agreed with Ms. Meyer.

21 39. On or about March 8, 2007, the accounts payable totaled \$7,405,342.33.

22 40. Ms. Meyer told Mr. Morabito on the telephone many times that she knew the
23 payables represented in the working capital estimate were way too low.

24 41. The estimate Mr. Morabito gave had, not only no basis in reality, but it was contrary
25 to what he knew firsthand to be the truth.

26 42. A claim for breach of contract requires the Herbst parties to prove each of the
27 following elements: (1) the parties entered into a valid and enforceable contract; (2) the Herbst
28 parties performed all obligations required under the contract or were excused from performance; (3)

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1 the Morabito parties breached their obligations under the contract; and (4) the Herbst parties
2 suffered damages as a result. *Nev. Contract Servs., Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157,
3 161, 68 P.3d 896, 899 (2003).

4 43. The CMA and the ARSPA are valid and enforceable contracts.

5 44. The obligations undertaken in the CMA were in consideration for the purchase of the
6 Development Sites.

7 45. Every one of the obligations of the CMA were breached by WCM and Mr. Morabito.

8 46. As a result of WCM and Mr. Morabito's breach, there was a total failure of
9 consideration.

10 47. As a result of WCM and Mr. Morabito's breach of the CMA and ARSPA, JH was
11 damaged.

12 48. To establish fraud in the inducement under Nevada law, the following elements must
13 be proven: (1) a false representation made by WCM and Mr. Morabito; (2) WCM and Mr.
14 Morabito's knowledge or belief that the representation was false (or knowledge that it had an
15 insufficient basis for making the representation); (3) WCM and Mr. Morabito's intention to
16 therewith induce the Herbst parties to consent to the contract's formation; (4) the Herbst parties'
17 justifiable reliance upon the misrepresentation; and (5) damages resulting from such reliance. *J.A.*
18 *Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004).

19 49. Mr. Morabito never for a single second had any intention to perform the services of
20 construction manager.

21 50. Mr. Morabito's representations under the CMA were intentionally false.

22 51. Mr. Morabito's representations were made for the purpose of inducing the purchase
23 of the Development Sites by JH.

24 52. JH reasonably relied on those representations.

25 53. It is established that Morabito fraudulently induced JH to purchase the Development
26 Sites.

27 54. As a result, JH was damaged.

28 55. CNC and Morabito have no claims under the CMA and the ARSPA.

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- 1 56. There were a number of GAAP violations in the BHI accounting.
- 2 57. The leases were mischaracterized and, therefore, violated the ARSPA because they
- 3 were not accounted for in accordance with GAAP.
- 4 58. The inclusion of rent in construction in progress constitutes a violation of GAAP.
- 5 59. The recording of construction in progress for non-BHI companies constitutes a
- 6 violation of GAAP.
- 7 60. The recording of landlord deposits as a reduction to construction in progress is a
- 8 violation of GAAP.
- 9 61. Finally, the inclusion of Nella assets in BHI's financial statements constitutes a
- 10 violation of GAAP.
- 11 62. There was no basis whatsoever for the contents of the working capital estimate other
- 12 than Mr. Morabito's decision to create it.
- 13 63. The estimate was prepared by the Mr. Morabito, the owner of the company.
- 14 64. The estimate was significantly and materially inconsistent with the information he
- 15 was given firsthand by his chief financial officer and by his personal accountant.
- 16 65. No one else reviewed the estimate that was prepared by Mr. Morabito.
- 17 66. The working capital report that was prepared by Mr. Morabito was intentionally
- 18 false, was done for the purpose of JH relying on it, and that JH did reasonably rely on it.
- 19 67. There is no data in the company to support the working capital estimate.
- 20 68. Mr. Morabito knew firsthand from his own employees and from his own accountant
- 21 that it was incorrect.
- 22 69. The working capital estimate was materially inflated and falsely inflated the value of
- 23 the company, and that became apparent quickly.
- 24 70. Had JH known the false statements in the working capital estimate, they would not
- 25 have bought the company.
- 26 71. The value of Berry-Hinckley Industries was materially misstated by Mr. Morabito.
- 27 72. A company does not get many hundreds of thousands of dollars worse in the first
- 28 thirty days.

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1 73. In December of 2006, CNC and Morabito told JH that BHI was losing about
 2 \$600,000 a year. The company was losing approximately \$1 million a month.

3 74. These material misrepresentations were made to fraudulently induce JH to purchase
 4 BHI.

5 75. It is established that Morabito fraudulently induced JH to purchase BHI.

6 76. All obligations of the Seller under the ARSPA are personally guaranteed by Paul
 7 Morabito.

8 77. Morabito, on behalf of CNC, stipulates and confesses to judgment being entered
 9 against CNC in the amount of \$85,000,000.

10 78. Morabito, on behalf of himself individually, stipulates and confesses to judgment
 11 being entered against him individually in the amount of \$85,000,000.

12 79. Morabito, on behalf of himself individually and on behalf of CNC, stipulate and
 13 agree that this Judgment in the amount of \$85,000,000 qualifies as a non-dischargeable debt under
 14 11 U.S.C. Section 523.

15 80. Morabito, on behalf of himself individually and on behalf of CNC, stipulate and
 16 agree that the facts outlined above establishing the debts and obligations of Morabito and CNC
 17 qualifies as a Section 523 non-dischargeable debt.

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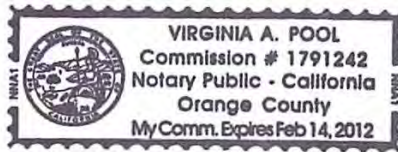
VERIFICATION

I, PAUL MORABITO, a duly authorized representative of CONSOLIDATED NEVADA CORPORATION, a Nevada corporation, hereby assert that the contents of this Confession of Judgment are true and accurate to the best of my knowledge and authorize entry of judgment in this matter for the sum of Eighty-Five Million Dollars (\$85,000,000.00) against CONSOLIDATED NEVADA CORPORATION.


By: PAUL MORABITO
for CONSOLIDATED NEVADA CORPORATION

SUBSCRIBED and SWORN to before me
this 30th day of November, 2011,
by PAUL MORABITO.

Virginia A. Pool
Notary Public



JONES VARGAS
300 East Second Street, Suite 1510
P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

VERIFICATION

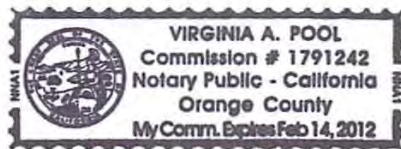
I, PAUL MORABITO, hereby assert that the contents of this Confession of Judgment are true and accurate to the best of my knowledge and authorize entry of judgment in this matter for the sum of Eighty-Five Million Dollars (\$85,000,000.00) against me, PAUL MORABITO, individually.



By: PAUL MORABITO, Individually

SUBSCRIBED and SWORN to before me
this 30th day of November, 2011,
by PAUL MORABITO.

Virginia A. Pool
Notary Public



JONES VARGAS
300 East Second Street, Suite 1510
P.O. Box 281

Rego, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

EXHIBIT J
STIPULATION TO CONFESSION OF JUDGMENT

(See attached.)

FINAL EXECUTION VERSION
21753500_6.doc

JONES VARGAS
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Tel: (775) 786-5000 Fax: (775) 786-1177

JOHN P. DESMOND, ESQ.
Nevada State Bar No. 5618
BRIAN R. IRVINE ESQ.
Nevada State Bar No. 7758
JONES VARGAS
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Reno, Nevada 89504-0281
Telephone: (775) 786-5000
Facsimile: (775) 786-1177
*Attorneys for JH, Inc., Jerry Herbst,
And Berry-Hinckley Industries*

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

JH, INC., a Nevada corporation; JERRY HERBST, CASE NO.:
an individual; and BERRY-HINCKLEY
INDUSTRIES, a Nevada corporation, DEPT. NO.:

Plaintiffs,

vs.

CONSOLIDATED NEVADA CORPORATION, a
Nevada corporation; PAUL A. MORABITO, an
individual,

Defendants.

STIPULATION

JH, INC., a Nevada corporation ("JH"), JERRY HERBST, an individual ("Herbst") and
BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("BHI"), on the one hand, and
CONSOLIDATED NEVADA CORPORATION, a Nevada corporation ("CNC"), and PAUL
MORABITO, an individual ("Morabito"), on the other hand, hereby consent, stipulate and agree
as follows:

1 1. CNC and Morabito consented, stipulated and agreed that Judgment in the amount
2 of \$85,000,000 be taken against them in the event of a default under the Settlement Agreement as
3 provided for in the attached Confession of Judgment ("Judgment").

4 2. The parties stipulate and agree that the Judgment qualifies as a non-dischargeable
5 debt under 11 U.S.C. Section 523.

6 3. The parties stipulate and agree that the facts underlying and outlined in the
7 Judgment establishing the debt qualify it as a Section 523 non-dischargeable debt.

8 DATED this 30th day of November, 2011. DATED this ____ day of November, 2011.

9 JONES VARGAS

10 ROBISON, BELAUSTEGUI,
SHARP & LOW

11 

12 JOHN P. DESMOND, ESQ.
13 BRIAN R. IRVINE, ESQ.
14 300 E. Second Street
Suite 1510
15 Reno, NV 89501

BARRY L. BRESLOW
71 Washington Street
Reno, NV 89503

16 *Attorneys for JH, Inc., Jerry Herbst, an*
17 *individual, and Berry-Hinckley Industries, a*
Nevada corporation

Attorneys for Consolidated Nevada
Corporation and Paul A. Morabito, an
individual

18 DATED this ____ day of November, 2011. DATED this ____ day of November, 2011.

19
20
21 PAUL A. MORABITO, Individually

22 PAUL A. MORABITO
Authorized Representative for
Consolidated Nevada Corporation

JONES VARGAS
300 East Second Street, Suite 1510 - P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

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7 Judgment establishing the debt qualify it as a Section 523 non-dischargeable debt.


8 DATED this ____ day of November, 2011.

DATED this 30 day of November, 2011.

9 JONES VARGAS

ROBISON, BELAUSTEGUI,
SHARP & LOW

10
11
12 JOHN P. DESMOND, ESQ.
13 BRIAN R. IRVINE, ESQ.
14 300 E. Second Street
15 Suite 1510
16 Reno, NV 89501


17 BARRY L. BRESLOW
18 71 Washington Street
19 Reno, NV 89503

20 *Attorneys for JH, Inc., Jerry Herbst, an*
21 *individual, and Berry-Hinckley Industries, a*
22 *Nevada corporation*

Attorneys for Consolidated Nevada
23 *Corporation and Paul A. Morabito, an*
24 *individual*

25 DATED this ____ day of November, 2011.

DATED this ____ day of November, 2011.

26
27
28 PAUL A. MORABITO, Individually

PAUL A. MORABITO
Authorized Representative for
Consolidated Nevada Corporation

JONES VARGAS
300 East Second Street, Suite 1510 - P.O. Box 281
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8 DATED this ____ day of November, 2011. DATED this ____ day of November, 2011.

9 JONES VARGAS

10 ROBISON, BELAUSTEGUI,
SHARP & LOW

11
12 JOHN P. DESMOND, ESQ.
13 BRIAN R. IRVINE, ESQ.
14 300 E. Second Street
Suite 1510
15 Reno, NV 89501


16 BARRY L. BRESLOW
17 71 Washington Street
18 Reno, NV 89503

19 *Attorneys for JH, Inc., Jerry Herbst, an*
20 *individual, and Berry-Hinckley Industries, a*
21 *Nevada corporation*

22 *Attorneys for Consolidated Nevada*
23 *Corporation and Paul A. Morabito, an*
24 *individual*

25 DATED this 30 day of November, 2011. DATED this 30 day of November, 2011.

26
27 
28 PAUL A. MORABITO, Individually

29
30 
31 PAUL A. MORABITO
32 Authorized Representative for
33 Consolidated Nevada Corporation

JONES VARGAS
300 East Second Street, Suite 1510 - P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

EXHIBIT 2

EXHIBIT 2

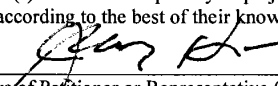
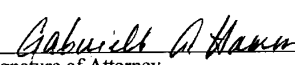
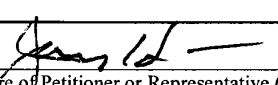
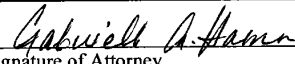
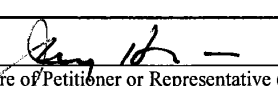

B 5 (Official Form 5) (12/07)

UNITED STATES BANKRUPTCY COURT District of Nevada		INVOLUNTARY PETITION	
IN RE (Name of Debtor – If Individual: Last, First, Middle) Morabito, Paul A.		ALL OTHER NAMES used by debtor in the last 8 years (Include married, maiden, and trade names.)	
Last four digits of Social-Security or other Individual's Tax-I.D. No./Complete EIN (If more than one, state all.): XXX-XX-6049			
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code) 8581 Santa Monica Boulevard, Suite 708 West Hollywood, CA 90069		MAILING ADDRESS OF DEBTOR (If different from street address) <div style="text-align: right;">ZIP CODE</div>	
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS Los Angeles County, California <div style="text-align: right;">ZIP CODE 90069</div>			
LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses) Unknown			
CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED <div style="text-align: center;"> <input checked="" type="checkbox"/> Chapter 7 <input type="checkbox"/> Chapter 11 </div>			
INFORMATION REGARDING DEBTOR (Check applicable boxes)			
Nature of Debts (Check one box.) Petitioners believe: <input type="checkbox"/> Debts are primarily consumer debts <input checked="" type="checkbox"/> Debts are primarily business debts	Type of Debtor (Form of Organization) <input checked="" type="checkbox"/> Individual (Includes Joint Debtor) <input type="checkbox"/> Corporation (Includes LLC and LLP) <input type="checkbox"/> Partnership <input type="checkbox"/> Other (If debtor is not one of the above entities, check this box and state type of entity below.) _____	Nature of Business (Check one box.) <input type="checkbox"/> Health Care Business <input type="checkbox"/> Single Asset Real Estate as defined in 11 U.S.C. § 101(51)(B) <input type="checkbox"/> Railroad <input type="checkbox"/> Stockbroker <input type="checkbox"/> Commodity Broker <input type="checkbox"/> Clearing Bank <input checked="" type="checkbox"/> Other	
VENUE <input type="checkbox"/> Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. <input checked="" type="checkbox"/> A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.		FILING FEE (Check one box) <input checked="" type="checkbox"/> Full Filing Fee attached <input type="checkbox"/> Petitioner is a child support creditor or its representative, and the form specified in § 304(g) of the Bankruptcy Reform Act of 1994 is attached. <i>[If a child support creditor or its representative is a petitioner, and if the petitioner files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.]</i>	
PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)			
Name of Debtor Consolidated Nevada Corporation	Case Number BK-N-13-51236	Date 06/20/2013	
Relationship Affiliate	District Nevada	Judge Beesley	
ALLEGATIONS (Check applicable boxes) 1. <input checked="" type="checkbox"/> Petitioner (s) are eligible to file this petition pursuant to 11 U.S.C. § 303 (b). 2. <input checked="" type="checkbox"/> The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code. 3.a. <input checked="" type="checkbox"/> The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute as to liability or amount; <div style="text-align: center;">or</div> b. <input type="checkbox"/> Within 120 days preceding the filing of this petition, a custodian, other than a trustee receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.		COURT USE ONLY	

B 5 (Official Form 5) (12/07) – Page 2

Name of Debtor Morabito, Paul A.

Case No. _____

TRANSFER OF CLAIM		
<input type="checkbox"/> Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).		
REQUEST FOR RELIEF		
Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.		
Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.		
x  Signature of Petitioner or Representative (State title) <u>JH, Inc.</u> Name of Petitioner _____ Date Signed <u>6/20/2013</u> Name & Mailing _____ Address of Individual _____ Signing in Representative _____ Capacity _____	x  <u>6/20/2013</u> Signature of Attorney _____ Date <u>Gabrielle A. Hamm, Esq, Gordon Silver</u> Name of Attorney Firm (If any) _____ <u>3960 Howard Hughes Pkwy 9th Floor, Las Vegas, NV 89169</u> Address _____ <u>(702) 796-5555</u> Telephone No. _____	
x  Signature of Petitioner or Representative (State title) <u>Jerry Herbst</u> Name of Petitioner _____ Date Signed <u>6/20/2013</u> Name & Mailing _____ Address of Individual _____ Signing in Representative _____ Capacity _____	x  <u>6/20/2013</u> Signature of Attorney _____ Date <u>Gabrielle A. Hamm, Esq, Gordon Silver</u> Name of Attorney Firm (If any) _____ <u>3960 Howard Hughes Pkwy 9th Floor, Las Vegas, NV</u> Address _____ <u>(702) 796-5555</u> Telephone No. _____	
x  Signature of Petitioner or Representative (State title) <u>Berry-Hinckley Industries</u> Name of Petitioner _____ Date Signed <u>6/20/2013</u> Name & Mailing _____ Address of Individual _____ Signing in Representative _____ Capacity _____	x  <u>6/20/2013</u> Signature of Attorney _____ Date <u>Gabrielle A. Hamm, Esq, Gordon Silver</u> Name of Attorney Firm (If any) _____ <u>3960 Howard Hughes Pkwy 9th Floor, Las Vegas, NV</u> Address _____ <u>(702) 796-5555</u> Telephone No. _____	
PETITIONING CREDITORS		
Name and Address of Petitioner	Nature of Claim	Amount of Claim
JH, Inc., 5195 Las Vegas Blvd. So. Las Vegas, NV 89119	See Attachment	77,000,000.00
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Jerry Herbst, 5195 Las Vegas Blvd. So. Las Vegas, NV 89119	See Attachment	77,000,000.00
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Berry-Hinckley Industries, 5195 Las Vegas Blvd. So. Las Vegas, NV 89119	See Attachment	77,000,000.00
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims 77,000,000.00

29 continuation sheets attached

1969119.pdf

Attachment to Involuntary Petition

JH, Inc., a Nevada corporation ("JH"), and P.A. MORABITO & CO. Ltd. ("PAMCO"), the predecessor-in-interest to Consolidated Nevada Corporation, a Nevada corporation ("CNC"), entered into an Amended and Restated Stock Purchase Agreement dated June 28, 2007 (the "ARSPA"), whereby JH was to purchase the stock of Berry-Hinckley Industries ("BHI") from PAMCO. Jerry Herbst ("Herbst," and collectively with JH and BHI, the "Herbst Parties") was the guarantor of the JH obligations under the ARSPA, and Paul A. Morabito ("Morabito," and together with CNC, the "Morabito Parties" or "Debtors") guaranteed the obligations of PAMCO.

A dispute developed between the Morabito Parties and the Herbst Parties (together, the "Parties") regarding the sale of the BHI stock to JH. The Morabito Parties filed a lawsuit against the Herbst Parties on December 3, 2007. The lawsuit was captioned *Consolidated Nevada Corp., et al. v. JH. et al.*, and was filed in Department 6 of the Second Judicial District Court in and for the County of Washoe (the "State Court"), Case No. CV07-02764 (together with all claims and counterclaims, the "State Court Action"). The Herbst Parties filed numerous counterclaims in the State Court Action against the Morabito Parties, including, but not limited to, fraud in the inducement, misrepresentation and breach of contract.

The State Court ultimately awarded the Herbst Parties total damages in the amount of \$149,444,777.80, representing both compensatory and punitive damages (the "State Court Judgment"). The State Court Judgment was entered by the Court on August 23, 2011. On October 12, 2010, the Court entered its findings of fact and conclusions of law related to the State Court Judgment (the "Findings of Fact and Conclusions of Law"). The Findings of Fact and Conclusions of Law outlined the factual and legal basis for the State Court Judgment.

While the Morabito Parties' appeal of the State Court Judgment (the "Appeal") was pending, the Parties entered into that certain Settlement Agreement and Mutual Release dated November 30, 2011 (the "Settlement Agreement"). Under the terms of the Settlement Agreement, the Parties agreed to file a Stipulation to Vacate Appeal and a Stipulation to Vacate Judgment and Findings of Fact and Conclusions of Law entered by the State Court. Such documents were executed and filed, and the State Court Action was dismissed with prejudice.

The Settlement Agreement further required the Morabito Parties to execute a Confession of Judgment and a Stipulation to Confession of Judgment in the amount of \$85,000,000 (referred to collectively as the "Confessed Judgment"). The Settlement Agreement provided that, upon breach of the Settlement Agreement and failure to cure, the Herbst Parties could file, *ex parte* and without notice, the Confessed Judgment in Department 6 of the Second Judicial District Court in and for the County of Washoe.

The Morabito Parties are in Default under the terms of the Settlement Agreement by reason of the following:

(i) Failure on the part of the Morabito Parties to timely comply with the terms of the Moreno settlement agreement related to the Moreno Lawsuit (the "Moreno Default");

(ii) Failure on the part of the Morabito Parties to timely pay amounts due and owing pursuant to the Lease for 425 Maestro resulting in a default under the Lease (the "Lease Default");

(iii) Failure on the part of the Morabito Parties to timely pay amounts due and owing pursuant to the Hinckley Note resulting in a default under the Hinckley Note (the “Hinckley Note Default”); and

(iv) Failure on the part of the Morabito Parties to pay to the Herbst Parties the cash payment of Four Million and No/100ths Dollars (\$4,000,000.00) due on or before March 1, 2013 (the “Cash Payment Default,” together with the Moreno Default and the Hinckley Note Default, the “Continuing Defaults”).

Thereafter, the Morabito Parties requested that the Herbst Parties forbear from exercising their rights and remedies under the Settlement Agreement with respect to the Continuing Defaults until December 1, 2013. Accordingly, the Parties entered into that certain Forbearance Agreement dated March 1, 2013. Pursuant to the Forbearance Agreement, the Morabito Parties made the following acknowledgments:

(i) the Continuing Defaults have occurred and are continuing; (ii) the Morabito Parties are unable to cure the Cash Payment Default; (iii) the Morabito Parties are unable to cure the Hinckley Note Default; (iv) pursuant to the terms of the Settlement Agreement, as a result of the occurrence of the Continuing Defaults, BHI and the Herbst Parties currently have the right to immediately exercise any one or more of the rights and remedies under the Settlement Agreement, at law or in equity, as they, in their sole discretion, deem necessary or desirable; and (v) the Morabito Parties do not have any defenses, legal or equitable, to the Continuing Defaults, and/or any other events of Default that may exist under the Settlement Agreement or the exercise by [the Herbst Parties] of any one or more of their rights and remedies under the Settlement Agreement.

Forbearance Agreement, ¶ 3.

In consideration of the covenants and agreements contained in the Forbearance Agreement, including the Herbst Parties’ agreement to grant the forbearance, the Morabito Parties agreed to, *inter alia*, provide the Herbst Parties no later than March 15, 2013, a fully executed forbearance agreement between the Morabito Parties and the holders of the Hinckley Note (the “Hinckley Forbearance Agreement”), and make certain payments of deferred principal on the payment due on March 1, 2013 under the Settlement Agreement, as follows:

April 30, 2013	\$ 62,500
May 15, 2013	\$ 62,500
June 15, 2013	\$125,000
July 15, 2013	\$125,000
August 15, 2013	\$125,000
September 15, 2013	\$125,000
October 15, 2013	\$125,000
November 15, 2013	\$125,000

See Forbearance Agreement, ¶ 6.

In addition, the Morabito Parties were required to make certain additional payments to the Herbst Parties commencing with a payment of \$68,437 on or before May 21, 2013. Id. at ¶ 6(g).

Moreover, the Forbearance Agreement provided that if the Morabito Parties failed to deliver the Hinckley Forbearance Agreement, the Herbst Parties would be entitled to “deem [the Forbearance] Agreement null and void ab initio, and may proceed to enforce any rights or remedies available to [] the Herbst Parties in the Settlement Agreement or by law.” Forbearance Agreement, ¶ 6(c).

Finally, the Forbearance Agreement provided that in the event of a default under the terms of the Forbearance Agreement or the Settlement Agreement, other than the Continuing Defaults, that “the Herbst Parties may immediately, and without expiration of any notice and cure period, exercise and enforce their rights and remedies under the Settlement Agreement or at law.” Forbearance Agreement, ¶ 8.

The Morabito Parties failed to comply with the Forbearance Agreement by failing to pay the Herbst Parties \$62,500 due by April 30, 2013, \$62,500 due by May 15, 2013, \$68,437 due by May 21, 2013 and \$125,000 due by June 15, 2013. In addition, the Morabito Parties failed to obtain or deliver the Hinckley Forbearance Agreement.

Pursuant to the Forbearance Agreement, the Morabito Parties recognized that they were in default under the Settlement Agreement, and that such defaults were of a continuing nature. As such, the Herbst Parties were not required to provide the Morabito Parties with any notice prior to filing and entering the Confession of Judgment with the Court, or exercising any other available remedies under the Settlement Agreement. In accordance therewith, the Herbst Parties filed the Confessed Judgment, consisting of the Confession of Judgment and the Stipulation to Confession of Judgment, on June 18, 2013 in the matter of *Consolidated Nevada Corp., et al. v. JH. et al.*, Case No. CV07-02764. A true and correct copy of the Confessed Judgment is attached hereto as Exhibit “A.”

Pursuant to the Confessed Judgment, the Morabito Parties are jointly and severally indebted to the Herbst Parties in the amount of \$85,000,000.00, less any credits or offsets for any payments made under the Settlement Agreement. Such debt is not contingent as to liability or subject to a bona fide dispute as to liability or amount. Such claims were not acquired for the purpose of commencing this case, and the Herbst Parties have not transferred any claims included herein.

The Confession of Judgment establishes fraud in the inducement and is non-dischargeable under 11 U.S.C. § 523. See Confession of Judgment, ¶¶ 48-54, 66-75. Further, the Morabito Parties have stipulated to the non-dischargeability of the judgment. See Stipulation to Confession of Judgment.

EXHIBIT A

EXHIBIT A

FILED

Electronically

06-18-2013:02:03:46 PM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3796507

1 GORDON SILVER
 JOHN P. DESMOND
 2 Nevada Bar No. 5618
 Email: jdesmond@gordonsilver.com
 3 BRIAN R. IRVINE
 Nevada Bar No. 7758
 4 Email: birvine@gordonsilver.com
 100 West Liberty Street
 5 Suite 940
 Reno, NV 89501
 6 Tel: (775) 343-7500
 Fax: (775) 786-0131

7 *Attorneys for Defendants/Counter-Claimants*
 8

9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

10 **IN AND FOR THE COUNTY OF WASHOE**

11 CONSOLIDATED NEVADA CORP., et al.,)	CASE NO. CV07-02764
12 Plaintiffs,)	
13 vs.)	DEPT. NO. 6
14 JH, INC., et al.,)	
15 Defendants.)	
16 _____		
17 JH, INC., et al.,)	
18 Counter-Claimants,)	
19 vs.)	
20 CONSOLIDATED NEVADA CORP., et al.,)	
21 Counter-Defendants.)	
22 _____		

23 **CONFESSION OF JUDGMENT**

24 Defendants/Counter-Claimants JH, INC., JERRY HERBST, and BERRY-HINCKLEY
 25 INDUSTRIES, by and through their counsel of record, Gordon Silver, file the attached
 26 Confession of Judgment, **Exhibit 1** hereto, against Plaintiff/Counter-Defendants,
 27 CONSOLIDATED NEVADA CORPORATION, and PAUL A. MORABITO.

28 ///

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 18th day of June, 2013.

GORDON SILVER

/s/ John P. Desmond
JOHN P. DESMOND
Nevada Bar No. 5618
Email: jdesmond@gordonsilver.com
BRIAN R. IRVINE
Nevada Bar No. 7758
Email: birvine@gordonsilver.com
100 West Liberty Street
Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131

Attorneys for Defendants/Counter-Claimants

EXHIBIT TABLE

Exhibit	Description	Pages¹
1	Confession of Judgment	20

¹ Exhibit page count is exclusive of exhibit slip sheet.

CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to NRCP 5(b), I am serving the attached **CONFESSION OF JUDGMENT** on the party set forth below by:

X	Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail at Reno, Nevada, postage prepaid, following ordinary business practices
	Certified Mail, Return Receipt Requested
	Via Facsimile (Fax)
	Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand-Delivered
	Federal Express (or other overnight delivery)
	Hand Delivery
X	Via E-Mail

addressed as follows:

Barry L. Breslow
 Robison, Belaustegui, Sharp and Low
 71 Washington Street
 Reno, NV 89503
BBreslow@rbsllaw.com

Dennis C. Vacco
 Lippes Mathias Wexler Friedman LLP
 665 Main Street, Suite 300
 Buffalo, New York 14203
dvacco@lippes.com

DATED this 18th day of June, 2013.

/s/ Cindy S. Grinstead
 An Employee of GORDON SILVER

FILED

Electronically

06-18-2013:02:03:46 PM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3796507

EXHIBIT 1

EXHIBIT 1

JONES VARGAS
300 East Second Street, Suite 1510
P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

1 JOHN P. DESMOND, ESQ.
Nevada State Bar No. 5618
2 BRIAN R. IRVINE ESQ.
Nevada State Bar No. 7758
3 JONES VARGAS
300 E. Second Street
4 Suite 1510
P.O. Box 281
5 Reno, Nevada 89504-0281
Telephone: (775) 786-5000
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7 *Attorneys for JH, Inc., Jerry Herbst,*
8 *And Berry-Hinckley Industries*

9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10 IN AND FOR THE COUNTY OF WASHOE

11 JH, INC., a Nevada corporation; JERRY HERBST, CASE NO.:
12 an individual; and BERRY-HINCKLEY
INDUSTRIES, a Nevada corporation, DEPT. NO.:

13 Plaintiffs,

14 vs.

15 CONSOLIDATED NEVADA CORPORATION, a
16 Nevada corporation; PAUL A. MORABITO, an
individual,

17 Defendants.
18

19 CONFESSION OF JUDGMENT

20 RECITALS:

21 A. JH, and P.A. MORABITO & CO. LTD., a Nevada corporation ("PAMCO") entered
22 into that certain Amended and Restated Stock Purchase Agreement dated June 28, 2007 (the
23 "ARSPA"), whereby JH was to purchase the stock of BHI from PAMCO. Herbst was the guarantor
24 of the JH obligations under the ARSPA, and Morabito guaranteed the obligations of PAMCO.
25 CNC is the successor in interest to PAMCO. The transaction contemplated by the ARSPA closed
26 on July 2, 2007.
27
28

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1 B. A dispute developed between the Morabito Parties and the Herbst Parties regarding
 2 the sale of the BHI stock to JH. Based thereon, the Morabito Parties filed a lawsuit against the
 3 Herbst Parties on December 3, 2007. The lawsuit was captioned Consolidated Nevada Corp., et al.
 4 v. JH, et al., and was filed in Department 6 of the Second Judicial District Court in and for the
 5 County of Washoe (the "Court"), Case No. CV07-02764 (together with all claims and
 6 counterclaims, the "Action").

7
 8 C. The Herbst Parties filed numerous counterclaims in the Action against the Morabito
 9 Parties, including, but not limited to, fraud in the inducement, misrepresentation and breach of
 10 contract.

11
 12 D. The matter was tried before the Honorable Judge Brent Adams by way of a bench
 13 trial commencing May 10, 2010 that lasted for several weeks. At the conclusion of the bench trial,
 14 the Court found that the Morabito Parties had breached the ARSPA and committed fraud in the
 15 inducement and misrepresentation in relation to numerous aspects of the transaction contemplated
 16 by the ARSPA. The Court ultimately awarded the Herbst Parties total damages in the amount of
 17 One Hundred Forty-Nine Million Four Hundred Forty-Four Thousand Seven Hundred Seventy-
 18 Seven and 80/100ths Dollars (\$149,444,777.80), representing both compensatory and punitive
 19 damages (the "Judgment"). The Judgment was entered by the Court on August 23, 2011.

20
 21 E. On October 12, 2010, the Court entered its findings of fact and conclusions or law
 22 related to the Judgment (the "Findings of Fact and Conclusions of Law"). The Findings of Fact and
 23 Conclusions of Law outlined the factual and legal basis for the Judgment.

24
 25 F. The Morabito Parties appealed the Findings of Fact and Conclusions of Law as well
 26 as the Judgment to the Nevada Supreme Court as identified by those certain appeals captioned
 27 Nevada Supreme Court Case Nos. 54412 and 57943. The Herbst Parties filed numerous cross-
 28

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1 appeals in the subject appeals. The appeals filed by the Morabito Parties and the cross appeals filed
 2 therein by the Herbst Parties, are collectively referred to herein as the "Appeal."

3 G. The Morabito Parties have represented that they are unable to satisfy the monetary
 4 Judgment entered against them in full.

5 H. The Parties agreed to settle the Action, and, on November 30, 2011 executed the
 6 Settlement Agreement and Mutual Release ("Settlement").

7 I. As part of the Settlement, the Parties agreed that the Appeals would be vacated as
 8 well as the Judgment and the Findings of Fact and Conclusions of Law.

9 J. As part of the Settlement, Consolidated Nevada Corporation ("CNC") and Morabito
 10 agree to make the following cash payments to JH, Inc. in addition to other cash payments and
 11 assumption of liabilities as referenced in the Settlement.

- 12 ○ December 1, 2011 - \$2.5 million
- 13 ○ June 1, 2012 - \$2.5 million
- 14 ○ March 1, 2013 - \$4 million
- 15 ○ December 1, 2013 - \$4 million

16 K. As part of the Settlement, beginning on December 1, 2011, CNC and Paul Morabito
 17 agreed to assume any and all obligations of the tenant under the lease for 425 Maestro Drive, Reno,
 18 Nevada, including but not limited to all rental payments, CAM charges, taxes, etc. CNC and Paul
 19 Morabito agreed to provide proof of each payment under the lease for 425 Maestro Drive, Reno,
 20 Nevada (and performance of any and all other non-monetary obligations) to JH, Inc. within five (5)
 21 days of each payment. CNC and Paul Morabito will indemnify and hold harmless JH, Inc. and Jerry
 22 Herbst for any and all claims related to obligations owed under the lease for 425 Maestro Drive,
 23 Reno, Nevada beginning on December 1, 2011 until the conclusion of the lease term.

24 L. As part of the Settlement, beginning on December 1, 2011, CNC and Paul Morabito
 25 agreed to assume any and all obligations of the Maker/Payor under the June 29, 2007 Note between
 26

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JH, Inc. as Maker and Payor and Arthur T. Hinckley, as Payee, including but not limited to those obligations set forth in Sections 1.1 through 1.3 of the Note, periodic interest payments and payment of the principal and accrued interest upon maturation. CNC and Paul Morabito agreed to provide proof of each payment under the Note between JH and Mr. Hinckley (and performance of any and all other non-monetary obligations) to JH, Inc. and Jerry Herbst for any and all claims related to the June 29, 2007 Note between JH, Inc. as Maker and Payor and Jerry Herbst as guarantor and Arthur T. Hinckley, as Payee.

M. As part of the Settlement, beginning on December 1, 2011, CNC and Paul Morabito agreed to indemnify and defend Berry-Hinckley Industries and Jerry Herbst in the lawsuit captioned as Desi Moreno, Trustee of the Desi Moreno 2001 Trust, et al. v. Berry-Hinckley Industries, et al., Case No. CV10-02329 in Department 4 of the Second Judicial District Court in and for the County of Washoe. CNC and Paul Morabito expressly agreed to indemnify Berry-Hinckley Industries and Jerry Herbst from any finding of liability or assessment of damages in that action. To facilitate the assumption of the duty to defend and indemnify in the context of the aforementioned case, CNC and Paul Morabito agreed to amend the Answer previously filed. It was agreed that the Amended Answer would admit liability to JH, Inc. pursuant to the indemnification provisions of the Amended and Restated Stock Purchase Agreement. Specifically, pursuant to Article 9.1(d) of the ARSPA, CNC and Paul Morabito agreed to admit that they were obligated to indemnify Berry-Hinckley Industries and Jerry Herbst for any loss that has already been suffered and any loss that may be suffered in the future as a result of the lawsuit filed by the Moreno Plaintiffs. It was agreed that failure to timely indemnify Berry-Hinckley Industries and Jerry Herbst from a findings of liability or damages would constitute a default under the settlement agreement. It was also agreed that in the event a judgment is entered against Berry-Hinckley Industries and/or Jerry Herbst, Paul Morabito and CNC agreed to either (1) satisfy said judgment within fifteen days; or (2) file a notice of appeal

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1 of said judgment within thirty days and post a bond pending appeal to stay execution against Berry-
 2 Hinckley Industries and/or Jerry Herbst. In the event of an appeal, if the decision is affirmed, Paul
 3 Morabito and CNC agreed to pay any judgment within fifteen days of an order of affirmance from
 4 the Nevada Supreme Court.

5 N. Paul Morabito, individually and as trustee of the Arcadia Living Trust, agreed that
 6 the real property located at 8355 Panorama Drive in Reno, Nevada currently held in the name of the
 7 Arcadia Living Trust would be listed for sale as soon as possible. The initial listing price was to be
 8 set as follows:
 9

10 • JH, Inc. and Jerry Herbst, on the one hand, and CNC and Paul Morabito, on
 11 the other hand, would each commission an appraiser of their choice that is licensed in the
 12 State of Nevada with at least five (5) years experience appraising residential real property in
 13 Northern Nevada.
 14

15 • Each appraiser would prepare a sale appraisal of the Panorama Drive
 16 property. The party requesting the appraisal would bear the expense of the same.
 17

18 • The initial listing price would be the mid-point, to the nearest thousand
 19 dollars, between the two appraisals. The listing price must be a minimum of \$2.5 million.
 20 Paul Morabito, individually and as trustee of the Arcadia Living Trust, represented and
 21 warranted that there is an existing mortgage on the real property located at 8355 Panorama
 22 Drive with a remaining pay-off amount of approximately \$1 million. Mr. Morabito
 23 represented and warranted, to the best of his personal knowledge, that there are no other
 24 mortgages or liens on the Panorama Drive property.
 25

26 • Paul Morabito, individually and as trustee of the Arcadia Living Trust, agreed
 27 that, upon the sale of the real property located at 8355 Panorama Drive, JH, Inc. and Jerry
 28 Herbst would receive the net proceeds of that sale, after closing costs and the existing \$1

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million mortgage are paid. Should JH, Inc. and Jerry Herbst receive more than \$1 million in net proceeds from that sale, CNC and Paul Morabito would be entitled to deduct any amount received by JH, Inc. and Jerry Herbst in excess of \$1 million from the \$4 million payment scheduled to be made under this settlement agreement on December 1, 2013.

- If the real property located at 8355 Panorama Drive, Reno, Nevada did not sell within six (6) months of the first listing date, representatives of each of the parties agreed to meet with the listing agent to determine if any actions should be taken to enable the property to be sold.

O. As part of the Settlement, CNC and Morabito agreed to execute this Confession of Judgment and stipulate that it is non-dischargeable in any bankruptcy proceeding filed by either CNC or Paul Morabito, in the amount of \$85 million. The Confession of Judgment may be filed, ex parte and with no notice to CNC or Paul Morabito, should CNC or Paul Morabito fail to perform or default on any of their obligations under the Settlement, and said failure to perform is not cured within fifteen (15) days. In the event all payments are made and obligations performed under the Settlement by CNC and Paul Morabito, this Confession of Judgment will be returned to CNC and Paul Morabito once all payments have been made and obligations performed.

P. In the event this Confession of Judgment is filed following an event of default which is not cured within fifteen (15) days, CNC and Paul Morabito agree not to defend or contest the filing of the Confession of Judgment.

NOW THEREFORE, CONSOLIDATED NEVADA CORPORATION, a Nevada corporation ("CNC"), and PAUL MORABITO, individually ("Morabito") hereby consent, stipulate and agree to the entry of judgment as follows:

1. The above Recitals A through P above, are hereby incorporated by reference entirely herein and expressly consented, stipulated and agreed to by CNC and Morabito.

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2. Berry-Hinckley Industries ("BHI") began operations in 1928 when Wayne Hinckley and Lawrence Semenza assumed the lease of the Flying A Service Station on Second and West Streets in Reno, Nevada.

3. In the late 1970s, Art Hinckley, Ward Hinckley's son, joined the business supervising the administrative staff of three employees.

4. BHI was very successful for generations.

5. The Stock of BHI was purchased on October 14, 2005, by P.A. Morabito & Co. ("PAMCO"), a company owned by Mr. Morabito, for approximately \$95 million

6. Paul Morabito, the controlling owner of PAMCO, was appointed president and CEO.

7. All real properties owned by BHI, and by related entities as operated by BHI, were separately sold to PAMCO, which properties were then sold to third parties.

8. As part of these sales, new leases were entered into with BHI as the lessee and the leases were at above-market rates.

9. JH, owned by Jerry Herbst, was formed for the purpose of acquiring BHI.

10. JH is a related party to Terrible Herbst, Inc. and to the Herbst family, who have decades of experience operating gas stations and convenience stores and, in recent years, some experience in the gaming industry.

11. By no later than December 31, 2008, BHI had zero value.

12. The ARSPA consists of two components.

13. First, the transaction consisted of the Development Sites. The Development Sites are ten parcels of real property that were partially improved or would be improved to create convenience stores and gas stations.

14. The primary assets in the second category were the operating convenience stores and gas stations.

15. Section 2.8(c) of the ARSPA obligates the seller to enter into a construction management agreement with the buyer and that agreement is attached as Exhibit E to the ARSPA.

16. The Construction Management Agreement ("CMA") provides that, in consideration for the purchase of the Development Sites by owner, the construction manager, which is Washoe

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1 Construction Management Services, LLC ("WCM"), a company created and owned by Mr.
 2 Morabito, has agreed to act as the construction manager for the project.

3 17. Mr. Morabito's company agreed to act as construction manager for this project in
 4 consideration for the purchase of the Development Sites by JH.

5 18. A few pertinent provisions of the CMA are as follows:

6 a. Article 1 provides, "[t]he Construction Manager will assist the Owner with
 7 the management of the Project, including monitoring Project costs, endeavoring to keep costs within
 8 the fixed sum contracts entered into by and between Owner and Dennis Banks Construction (the
 9 "Contractor") for certain of the Development Sites and within the budgets developed by Owner and
 10 the Construction Manager for the balance of the Development Sites for which the Owner will have
 11 entered into Cost, Plus Contracts with the Contractor, . . . and working with the Contractor to
 12 schedule the work of the Project efficiently so that the Project will be ready for occupancy on the
 13 dates set forth in the Construction Contracts."

14 b. Article 2.1 provides, "[t]he Construction Manager will review all plans and
 15 specifications and advise on systems and materials, construction feasibility, time requirements for
 16 procurement, installation and construction, relative costs, and provide recommendations for
 17 economies as appropriate. The Construction Manager is hereby authorized to act as the Owner's
 18 agent in dealing with the Architect, the Construction Contracts, subcontractors and their respective
 19 employees and agents."

20 c. Paragraph 2.3 provides, in part, "[t]he Construction Manager will work with
 21 the Contractor to assure completion of the Project within the time periods set forth in the
 22 Construction Contracts.. In the event any change order or other adjustment is requested by Owner
 23 to be made to any Construction Contract, Construction manager will work with the Contractor to
 24 assure proper inclusion of such change order or other adjustment into the Project. "

25 19. Pursuant to paragraph 3.2, the relevant terms and conditions of the ARSPA are
 26 incorporated in the CMA.

27 20. The role of the construction manager is to be the owner's representative to ensure that
 28 both the schedule of the construction project and its costs adhere to the budget and timeline for

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1 construction. The construction manager asks questions and looks at the long-term items of a
 2 contract. The construction manager works directly with subcontractors, taking bids, evaluating the
 3 costs of various components of the construction, creating a construction timeline, and making, at a
 4 minimum, monthly reports to the owner so the owner is advised consistently of the milestones of
 5 construction. A good construction manager facilitates the process and ensures proper and
 6 responsible accounting of the owner's money on the project.

7 21. The construction manager is usually involved in the construction on a daily basis and
 8 frequently visits the construction site. A construction manager should review the construction
 9 schedule with the contractor and meet with the contractor on a weekly basis.

10 22. WCM and Mr. Morabito performed none of the services contemplated by the CMA.

11 23. Mr. Morabito made it absolutely plain that in his view, the only purpose of the CMA
 12 was for him to get paid. Mr. Morabito actually said, "What does the management of the
 13 construction sites mean? I have no idea what that means."

14 24. Garrett Gordon is an attorney with the law firm of Lewis and Roca in Reno, Nevada.
 15 Mr. Gordon made it extremely plain that he does not have any competence in construction
 16 supervision. Mr. Gordon testified that he was called every day by Mr. Morabito, who wanted to
 17 know the status of the building permits so that Mr. Morabito could get his money. Mr. Gordon's job
 18 was to secure Mr. Morabito's money by getting building permits or certificates of occupancy.

19 25. Phillip Tripoli has no capacity to, or did not in any significant way, supervise this
 20 project. Mr. Tripoli did not communicate at all with the owner of the project.

21 26. Mr. Morabito was not managing the construction project, he was managing his
 22 money.

23 27. The ARSPA required PAMCO to provide a working capital estimate prior to closing,
 24 which it did. There was no basis whatsoever for the contents of the working capital estimate. Mr.
 25 Morabito decided to simply create it.

26 28. There is not one piece of paper that can be produced to support the exaggerated value
 27 of the company as set forth in the working capital estimate.

28

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1 29. The major difference between Mr. Morabito's estimate and the actual working capital
2 is accounts payable. This fact is significant.

3 30. Mr. Morabito did not prepare the monthly financial statements.

4 31. There is no evidence that the monthly financial statements were inaccurate.

5 32. Mr. Morabito did not have access to the accounting system of the company.

6 33. Paula Meyer, then CFO of BHI, gave Mr. Morabito evidence to understand that the
7 leases were not being flipped as was being represented to JH.

8 34. In the course of events leading to the closing of this transaction, there was a point
9 where Mr. Morabito only wanted Ms. Meyer to communicate with him and not the lawyers or BCC
10 Capital who was representing Mr. Morabito and CNC in the transaction. This is a complex
11 transaction involving tens of millions of dollars. As the CFO, Ms. Meyer had access to the financial
12 statements of the company while the CEO of the company, Mr. Morabito, did not have access.
13 Nevertheless, Ms. Meyer was told to only communicate with Mr. Morabito.

14 35. Ms. Meyer constantly had disagreements with Mr. Morabito about the amount of
15 accounts payable.

16 36. The accounts payable were in the range of at least five to six million, but Mr.
17 Morabito represented to JH that the accounts payable amount was much lower than that.

18 37. Stan Bernstein, Mr. Morabito's personal accountant, agreed with Ms. Meyer
19 regarding accounts payable.

20 38. Karen Scarborough, BHI Controller, also agreed with Ms. Meyer.

21 39. On or about March 8, 2007, the accounts payable totaled \$7,405,342.33.

22 40. Ms. Meyer told Mr. Morabito on the telephone many times that she knew the
23 payables represented in the working capital estimate were way too low.

24 41. The estimate Mr. Morabito gave had, not only no basis in reality, but it was contrary
25 to what he knew firsthand to be the truth.

26 42. A claim for breach of contract requires the Herbst parties to prove each of the
27 following elements: (1) the parties entered into a valid and enforceable contract; (2) the Herbst
28 parties performed all obligations required under the contract or were excused from performance; (3)

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1 the Morabito parties breached their obligations under the contract; and (4) the Herbst parties
2 suffered damages as a result. *Nev. Contract Servs., Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157,
3 161, 68 P.3d 896, 899 (2003).

4 43. The CMA and the ARSPA are valid and enforceable contracts.

5 44. The obligations undertaken in the CMA were in consideration for the purchase of the
6 Development Sites.

7 45. Every one of the obligations of the CMA were breached by WCM and Mr. Morabito.

8 46. As a result of WCM and Mr. Morabito's breach, there was a total failure of
9 consideration.

10 47. As a result of WCM and Mr. Morabito's breach of the CMA and ARSPA, JH was
11 damaged.

12 48. To establish fraud in the inducement under Nevada law, the following elements must
13 be proven: (1) a false representation made by WCM and Mr. Morabito; (2) WCM and Mr.
14 Morabito's knowledge or belief that the representation was false (or knowledge that it had an
15 insufficient basis for making the representation); (3) WCM and Mr. Morabito's intention to
16 therewith induce the Herbst parties to consent to the contract's formation; (4) the Herbst parties'
17 justifiable reliance upon the misrepresentation; and (5) damages resulting from such reliance. *J.A.*
18 *Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004).

19 49. Mr. Morabito never for a single second had any intention to perform the services of
20 construction manager.

21 50. Mr. Morabito's representations under the CMA were intentionally false.

22 51. Mr. Morabito's representations were made for the purpose of inducing the purchase
23 of the Development Sites by JH.

24 52. JH reasonably relied on those representations.

25 53. It is established that Morabito fraudulently induced JH to purchase the Development
26 Sites.

27 54. As a result, JH was damaged.

28 55. CNC and Morabito have no claims under the CMA and the ARSPA.

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- 1 56. There were a number of GAAP violations in the BHI accounting.
- 2 57. The leases were mischaracterized and, therefore, violated the ARSPA because they
- 3 were not accounted for in accordance with GAAP.
- 4 58. The inclusion of rent in construction in progress constitutes a violation of GAAP.
- 5 59. The recording of construction in progress for non-BHI companies constitutes a
- 6 violation of GAAP.
- 7 60. The recording of landlord deposits as a reduction to construction in progress is a
- 8 violation of GAAP.
- 9 61. Finally, the inclusion of Nella assets in BHI's financial statements constitutes a
- 10 violation of GAAP.
- 11 62. There was no basis whatsoever for the contents of the working capital estimate other
- 12 than Mr. Morabito's decision to create it.
- 13 63. The estimate was prepared by the Mr. Morabito, the owner of the company.
- 14 64. The estimate was significantly and materially inconsistent with the information he
- 15 was given firsthand by his chief financial officer and by his personal accountant.
- 16 65. No one else reviewed the estimate that was prepared by Mr. Morabito.
- 17 66. The working capital report that was prepared by Mr. Morabito was intentionally
- 18 false, was done for the purpose of JH relying on it, and that JH did reasonably rely on it.
- 19 67. There is no data in the company to support the working capital estimate.
- 20 68. Mr. Morabito knew firsthand from his own employees and from his own accountant
- 21 that it was incorrect.
- 22 69. The working capital estimate was materially inflated and falsely inflated the value of
- 23 the company, and that became apparent quickly.
- 24 70. Had JH known the false statements in the working capital estimate, they would not
- 25 have bought the company.
- 26 71. The value of Berry-Hinckley Industries was materially misstated by Mr. Morabito.
- 27 72. A company does not get many hundreds of thousands of dollars worse in the first
- 28 thirty days.

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1 73. In December of 2006, CNC and Morabito told JH that BHI was losing about
 2 \$600,000 a year. The company was losing approximately \$1 million a month.

3 74. These material misrepresentations were made to fraudulently induce JH to purchase
 4 BHI.

5 75. It is established that Morabito fraudulently induced JH to purchase BHI.

6 76. All obligations of the Seller under the ARSPA are personally guaranteed by Paul
 7 Morabito.

8 77. Morabito, on behalf of CNC, stipulates and confesses to judgment being entered
 9 against CNC in the amount of \$85,000,000.

10 78. Morabito, on behalf of himself individually, stipulates and confesses to judgment
 11 being entered against him individually in the amount of \$85,000,000.

12 79. Morabito, on behalf of himself individually and on behalf of CNC, stipulate and
 13 agree that this Judgment in the amount of \$85,000,000 qualifies as a non-dischargeable debt under
 14 11 U.S.C. Section 523.

15 80. Morabito, on behalf of himself individually and on behalf of CNC, stipulate and
 16 agree that the facts outlined above establishing the debts and obligations of Morabito and CNC
 17 qualifies as a Section 523 non-dischargeable debt.

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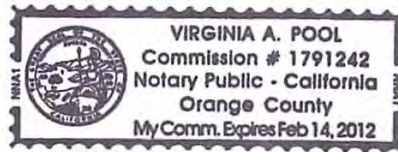
VERIFICATION

I, PAUL MORABITO, a duly authorized representative of CONSOLIDATED NEVADA CORPORATION, a Nevada corporation, hereby assert that the contents of this Confession of Judgment are true and accurate to the best of my knowledge and authorize entry of judgment in this matter for the sum of Eighty-Five Million Dollars (\$85,000,000.00) against CONSOLIDATED NEVADA CORPORATION.


By: PAUL MORABITO
for CONSOLIDATED NEVADA CORPORATION

SUBSCRIBED and SWORN to before me
this 30th day of November, 2011,
by PAUL MORABITO.

Virginia A. Pool
Notary Public



JONES VARGAS
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VERIFICATION

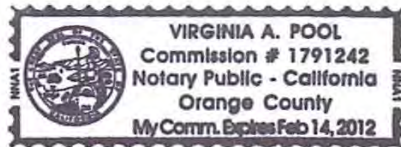
I, PAUL MORABITO, hereby assert that the contents of this Confession of Judgment are true and accurate to the best of my knowledge and authorize entry of judgment in this matter for the sum of Eighty-Five Million Dollars (\$85,000,000.00) against me, PAUL MORABITO, individually.



By: PAUL MORABITO, Individually

SUBSCRIBED and SWORN to before me
this 30th day of November, 2011,
by PAUL MORABITO.

Virginia A. Pool
Notary Public



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EXHIBIT J
STIPULATION TO CONFESSION OF JUDGMENT

(See attached.)

FINAL EXECUTION VERSION
21753500_6.doc

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9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF WASHOE

11 JH, INC., a Nevada corporation; JERRY HERBST, CASE NO.:
12 an individual; and BERRY-HINCKLEY
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13 Plaintiffs,

14 vs.

15 CONSOLIDATED NEVADA CORPORATION, a
16 Nevada corporation; PAUL A. MORABITO, an
individual,

17 Defendants.
18 _____

19 **STIPULATION**

20 JH, INC., a Nevada corporation ("JH"), JERRY HERBST, an individual ("Herbst") and
21 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("BHI"), on the one hand, and
22 CONSOLIDATED NEVADA CORPORATION, a Nevada corporation ("CNC"), and PAUL
23 MORABITO, an individual ("Morabito"), on the other hand, hereby consent, stipulate and agree
24 as follows:
25
26
27
28

1 1. CNC and Morabito consented, stipulated and agreed that Judgment in the amount
2 of \$85,000,000 be taken against them in the event of a default under the Settlement Agreement as
3 provided for in the attached Confession of Judgment ("Judgment").

4 2. The parties stipulate and agree that the Judgment qualifies as a non-dischargeable
5 debt under 11 U.S.C. Section 523.

6 3. The parties stipulate and agree that the facts underlying and outlined in the
7 Judgment establishing the debt qualify it as a Section 523 non-dischargeable debt.

8 DATED this 30th day of November, 2011. DATED this ____ day of November, 2011.

9 JONES VARGAS

10 ROBISON, BELAUSTEGUI,
SHARP & LOW

11 

12 JOHN P. DESMOND, ESQ.
13 BRIAN R. IRVINE, ESQ.
14 300 E. Second Street
Suite 1510
15 Reno, NV 89501

16 BARRY L. BRESLOW
17 71 Washington Street
Reno, NV 89503

18 *Attorneys for JH, Inc., Jerry Herbst, an*
19 *individual, and Berry-Hinckley Industries, a*
20 *Nevada corporation*

21 *Attorneys for Consolidated Nevada*
22 *Corporation and Paul A. Morabito, an*
23 *individual*

24 DATED this ____ day of November, 2011. DATED this ____ day of November, 2011.

25 PAUL A. MORABITO, Individually

26 PAUL A. MORABITO
27 Authorized Representative for
28 Consolidated Nevada Corporation

JONES VARGAS
300 East Second Street, Suite 1510 - P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

1 1. CNC and Morabito consented, stipulated and agreed that Judgment in the amount
2 of \$85,000,000 be taken against them in the event of a default under the Settlement Agreement as
3 provided for in the attached Confession of Judgment ("Judgment").

4 2. The parties stipulate and agree that the Judgment qualifies as a non-dischargeable
5 debt under 11 U.S.C. Section 523.

6 3. The parties stipulate and agree that the facts underlying and outlined in the
7 Judgment establishing the debt qualify it as a Section 523 non-dischargeable debt.


8 DATED this ____ day of November, 2011.

DATED this 30 day of November, 2011.

9 JONES VARGAS

ROBISON, BELAUSTEGUI,
SHARP & LOW

10
11
12 JOHN P. DESMOND, ESQ.
13 BRIAN R. IRVINE, ESQ.
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15 Suite 1510
16 Reno, NV 89501


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18 71 Washington Street
19 Reno, NV 89503

20 *Attorneys for JH, Inc., Jerry Herbst, an*
21 *individual, and Berry-Hinckley Industries, a*
22 *Nevada corporation*

Attorneys for Consolidated Nevada
23 *Corporation and Paul A. Morabito, an*
24 *individual*

25 DATED this ____ day of November, 2011.

DATED this ____ day of November, 2011.

26
27
28 PAUL A. MORABITO, Individually

PAUL A. MORABITO
Authorized Representative for
Consolidated Nevada Corporation

JONES VARGAS
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2 of \$85,000,000 be taken against them in the event of a default under the Settlement Agreement as
3 provided for in the attached Confession of Judgment ("Judgment").

4 2. The parties stipulate and agree that the Judgment qualifies as a non-dischargeable
5 debt under 11 U.S.C. Section 523.

6 3. The parties stipulate and agree that the facts underlying and outlined in the
7 Judgment establishing the debt qualify it as a Section 523 non-dischargeable debt.

8 DATED this ____ day of November, 2011. DATED this ____ day of November, 2011.

9 JONES VARGAS

10 ROBISON, BELAUSTEGUI,
SHARP & LOW

11
12 JOHN P. DESMOND, ESQ.
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19 *individual, and Berry-Hinckley Industries, a*
20 *Nevada corporation*

21 *Attorneys for Consolidated Nevada*
22 *Corporation and Paul A. Morabito, an*
23 *individual*

24 DATED this 30 day of November, 2011. DATED this 30 day of November, 2011.


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26 
27 PAUL A. MORABITO, Individually

28

PAUL A. MORABITO
Authorized Representative for
Consolidated Nevada Corporation

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300 East Second Street, Suite 1510 - P.O. Box 281
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EXHIBIT 3

EXHIBIT 3


Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
December 17, 2014

GORDON SILVER
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Attorneys for Petitioning Creditors
JH, Inc., Jerry Herbst, and Berry-Hinckley Industries

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In re:
CONSOLIDATED NEVADA CORPORATION,

Alleged Debtor.

Case No.: BK-N-13-51236 GWZ
Chapter 7

Date: November 21, 2014
Time: 10:00 a.m.

ORDER FOR RELIEF UNDER CHAPTER 7

JH, Inc. ("JH"), Jerry Herbst ("Herbst"), and Berry-Hinckley Industries ("BHI" and together with JH and Herbst, the "Petitioning Creditors"), by and through their counsel, the law firm of Gordon Silver, submitted their *Motion for Summary Judgment* [ECF No. 35] (the "Motion") on August 14, 2014. On October 3, 2014, Consolidated Nevada Corporation ("CNC"), by and through its counsel, Robinson, Belaustegui, Sharp & Low and Hartman &

Hartman, filed its *Non-Opposition to Motion for Summary Judgment* [ECF No. 48] (the “Non-Opposition”). The Court held a hearing on the Motion on November 21, 2014 (the “Hearing”). Gerald M. Gordon, Esq. and Brian R. Irvine, Esq., of the law firm of Gordon Silver, appeared on behalf of the Petitioning Creditors. Frank C. Gilmore, Esq. and Jeffrey L. Hartman, Esq. appeared for the alleged debtor, CNC.

Based upon the *Order Granting Summary Judgment and Judgment*, entered concurrently herewith, it having been determined after the Hearing on notice that the requirements for entering an order for relief under 11 U.S.C. § 303 have been satisfied, and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. This Order constitutes an “Order for Relief” against CNC under Section 303(h), Chapter 11, Title 11, United States Code.

2. The date of the filing of the petition and the commencement of this case is June 20, 2014.

3. All pretrial hearings and other hearings related to a trial on the Involuntary Petition shall be vacated.

IT IS SO ORDERED.

PREPARED AND SUBMITTED BY:

GORDON SILVER

By: /s/ Mark M. Weisenmiller
 GERALD M. GORDON, ESQ.
 BRIAN R. IRVINE, ESQ.
 MARK M. WEISENMILLER, ESQ.
 100 W. Liberty Street
 Reno, Nevada 89501
Attorneys for Petitioning Creditors

APPROVED/DISAPPROVED

ROBISON, BELAUSTEGUI, SHARP &
 LOW

By: /s/ Frank C. Gilmore
 FRANK C. GILMORE, ESQ.
 BARRY L. BRESLOW, ESQ.
 71 Washington Street
 Reno, Nevada 89503
Attorneys for Consolidated Nevada Corporation

LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

- ☐ The court waived the requirement of approval under LR 9021(b)(1).
- ☐ No party appeared at the hearing or filed an objection to the motion.
- ☒ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated above.


FRANK C. GILMORE, ESQ. and JEFFREY L. HARTMAN, ESQ.

- ☐ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objection to the form or content of the order.

###

EXHIBIT 4

EXHIBIT 4


Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
December 17, 2014

GORDON SILVER
GERALD M. GORDON, ESQ., Nevada Bar No. 229
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Attorneys for Petitioning Creditors
JH, Inc., Jerry Herbst, and Berry-Hinckley Industries

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In re:
PAUL A. MORABITO, an individual,

Alleged Debtor.

Case No.: BK-N-13-51237-GWZ
Chapter 7

Date: November 21, 2014
Time: 10:00 a.m.

ORDER FOR RELIEF UNDER CHAPTER 7

A hearing on the *Motion for Summary Judgment* [ECF No. 131] (the "Motion"), filed by JH, Inc. ("JH"), Jerry Herbst ("Herbst"), and Berry-Hinckley Industries ("BHI" and together with JH and Herbst, the "Petitioning Creditors"), by and through their counsel, the law firm of Gordon Silver, was held on November 21, 2014 (the "Hearing"). Gerald M. Gordon, Esq. and Brian R. Irvine, Esq., of the law firm of Gordon Silver, appeared on behalf of the Petitioning

1 Creditors. Frank C. Gilmore, Esq. and Jeffrey L. Hartman, Esq. appeared for the alleged debtor,
 2 Paul A. Morabito ("Morabito").

3 Based upon the *Findings of Fact and Conclusions of Law in Support of Order Granting*
 4 *Summary Judgment and Judgment* and the *Order Granting Summary Judgment and Judgment*,
 5 both entered concurrently herewith, it having been determined after the Hearing on notice that
 6 the requirements for entering an order for relief under 11 U.S.C. § 303 have been satisfied, and
 7 good cause appearing;

8 **IT IS HEREBY ORDERED, ADJUDGED and DECREED** as follows:

9 1. This Order constitutes an "Order for Relief" against Morabito under
 10 Section 303(h), Chapter 11, Title 11, United States Code.

11 2. The date of the filing of the petition and the commencement of this case is June
 12 20, 2014.

13 3. All pretrial hearings and other hearings related to a trial on the Involuntary
 14 Petition shall be vacated.

15 **IT IS SO ORDERED.**

16 PREPARED AND SUBMITTED BY:

17 GORDON SILVER

18
 19
 20 By: /s/ Mark M. Weisenmiller
 21 GERALD M. GORDON, ESQ.
 22 BRIAN R. IRVINE, ESQ.
 23 MARK M. WEISENMILLER, ESQ.
 24 100 W. Liberty Street
 Reno, Nevada 89501
Attorneys for Petitioning Creditors

APPROVED/DISAPPROVED

ROBISON, BELAUSTEGUI, SHARP &
 LOW

By: /s/ Frank C. Gilmore
 FRANK C. GILMORE, ESQ.
 BARRY L. BRESLOW, ESQ.
 71 Washington Street
 Reno, Nevada 89503
*Attorneys for Paul A. Morabito and
 Consolidated Nevada Corporation*

LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

- ☐ The court waived the requirement of approval under LR 9021(b)(1).
- ☐ No party appeared at the hearing or filed an objection to the motion.
- ☒ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated above.

FRANK C. GILMORE, ESQ. and JEFFREY L. HARTMAN, ESQ.

- ☐ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objection to the form or content of the order.

###